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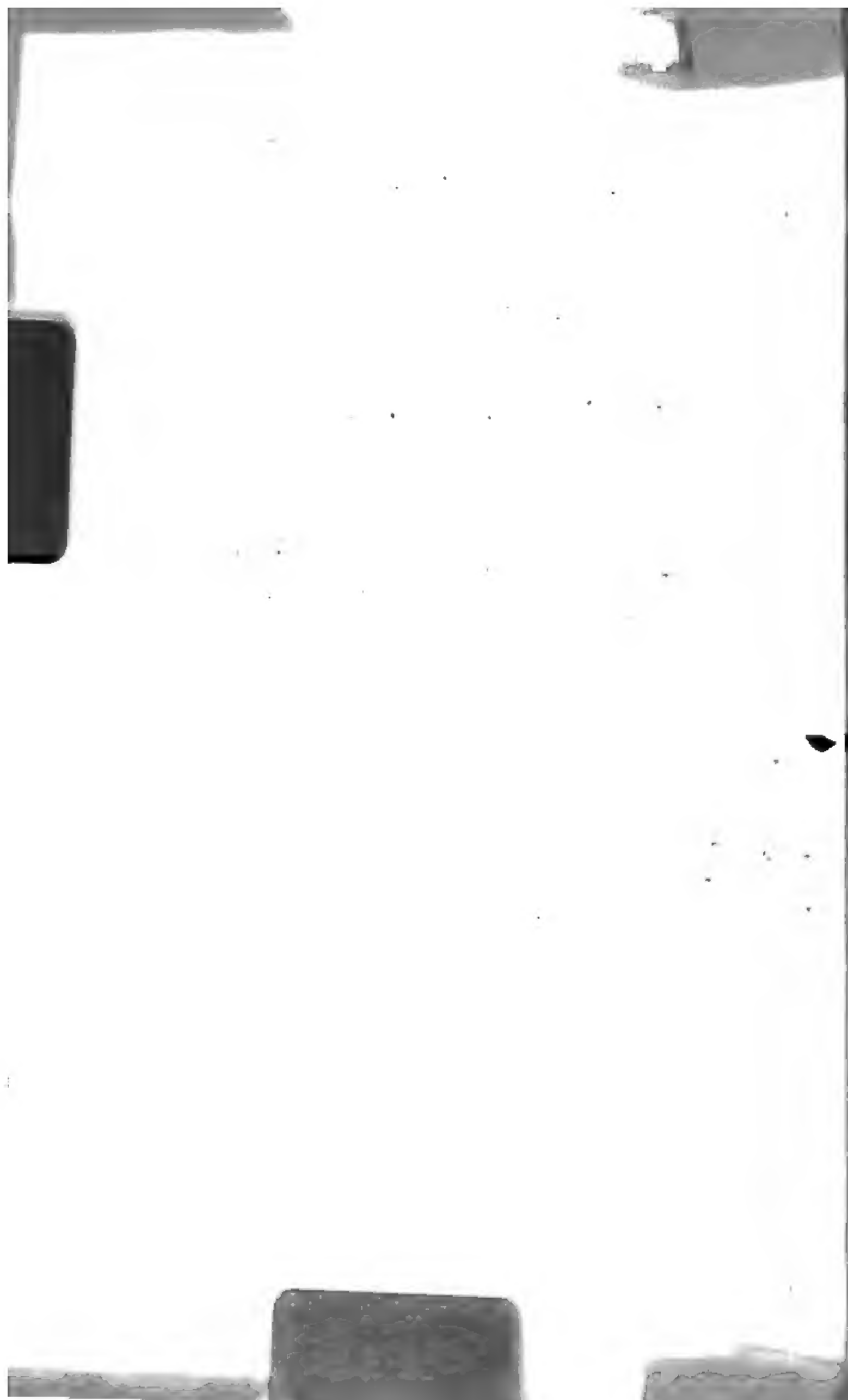
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REPORTS
OF
CASES
ARGUED AND DETERMINED
●
IN THE
English Ecclesiastical Courts:

WITH
TABLES OF THE CASES AND PRINCIPAL MATTERS.

1831.
EDITED BY
EDWARD D. INGRAHAM, Esquire,
OF THE PHILADELPHIA BAR.

VOL. I.
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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
ECCLESIASTICAL COURTS,
AT
Doctors' Commons;
AND IN THE
HIGH COURT OF DELEGATES.

By JOSEPH PHILLIMORE, LL.D.

VOL. I.

**CONTAINING CASES FROM HILARY TERM, 1809,
TO HILARY TERM, 1812, INCLUSIVE.**

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

ECCLESIASTICAL COURTS.

PREROGATIVE COURT OF CANTERBURY.

THOROLD v. THOROLD.—p. 1.

5485

A paper in the form of a deed of gift, admitted to probate.

AN allegation (*a*) was offered to the Court on the behalf of Miss Thorold, propounding a paper, in the form of a deed of gift, as the last will and testament of her brother, William Thorold, Esq. of Syston Park, in the county of Lincoln.

The adverse party in the cause was Sir Thomas Thorold, Bart., the father of the deceased.

The paper propounded was, in form and substance, as follows:

“Be it known to all it may concern, that I, William Thorold, of Syston Park, in the county of Lincoln, *do hereby give* (after my death) to my beloved sister, Jane Thorold, of Syston Park, in the said county of Lincoln, the following estates; and also, should all, or any parts of these estates, be sold by me during my life, all such monies arising therefrom as shall be placed in the public funds, shall be at her disposal, viz.

“1st, My third in the remainder of the unsold Ayton estate, in the county of Durham.

“2dly, My moiety in the Husthwaite and Newbald estates, in the county of York.

“3dly, My moiety in an estate at Elmley, in the county of York.

(*a*) According to the practice of the Prerogative Court, the facts intended to be relied upon in support of any contested suit are set forth in a plea, which is termed an allegation; this is submitted to the inspection of the counsel of the adverse party; and if it appears to them objectionable, either in form or substance, they *oppose the admission* of it. If the opposition goes to the substance of the allegation, and is held to be well founded, the Court rejects it; by which mode of proceeding, the suit is terminated without going into any proof of the facts.

“ 4thly, My estate at Barrowby in the county of Lincoln.

“ 5thly, My estate at Carlton, in the county of Lincoln.

“ 6thly, My estate at Holbeach, in the county of Lincoln.

“ 7thly, My house and lands, at Derby.

“ This deed of gift, in my own proper hand-writing, was made, sealed, signed and delivered, to my aforesaid beloved sister, Jane Thorold, spinster, of Syston Park, in the county of Lincoln, this 16th day of December, one thousand eight hundred and six,

“ WILLIAM THOROLD.

“ In the presence of

“ James Speed,

“ William Armes,

“ Henry Parlett.”

Arnold and Burnaby, against the admission of the allegation.

It is impossible that this paper can be considered as testamentary, inasmuch as there is neither the executor nor residuary legatee named in it, and it purports to be only a deed of gift;—it contains, indeed, the expression, “ I hereby give, after my death,” but it is not every paper that disposes of property after death which can be considered as of a testamentary nature. A variety of contracts are not so considered; settlements, for instance, made in contemplation of marriage, are usually to take place after the death of one of the parties, and have never been considered as testamentary; and yet they would become so by the same rule, which would impress a testamentary character on an instrument of this description. A paper, therefore, may dispose of property after death, and yet not be entitled to probate. The rule is not universal, but must vary according to the circumstances of each case: and the safest guide for the Court will be the intention of the writer, as evidenced by his own language;—here he calls the instrument a deed of gift. The difference between a testamentary paper and a deed of gift is essential and obvious; the former is ambulatory till the death of the testator, the latter is irrevocable. The one does not require delivery into the hand of the party for whose benefit it is intended, the other does.

Swinburne (a) distinguishes between deeds of gift which are to take place as donations mortis causâ, and such as are to operate as legacies; and this according to his definition, would be donatio mortis causâ, over which, this Court could entertain no jurisdiction.

Swabey and *Adams* in support of the allegation, referred to *Green v. Proude*, 1 Mod. 117; *Rigden v. Vallier*, 2 Vesey, p. 252; *Corp v. Corp*, and *Johnson v. Johnson*. With respect to the passage from *Swinburne*, it may be answered, that in *Swinburne's* time no testament could be made without an executor.(b) There is also a marked

(a) Part 1. sec. 7. *Swinburne* has not, perhaps, explained himself on this topic with his usual perspicuity; indeed it has been admitted by his Editor that there is some perplexity in the passage to which allusion is made in the argument: he had obviously in his view when he was writing the several passages on this subject in the Roman law. See Digest, lib. 39. tit. 6. Just. 1. 2. tit. 7.

(b) *Swinburne* says, “ The executor is the foundation, the substance, the head, and indeed the true formal cause of the testament, without which a will is no proper testament, and by the which only the will is made a testament.”—*Swinburne*, part 1. sec. 3. p. 14. See also the same author, part 1. sec. 1. p. 4, and again, sec. 11. p. 83. and *Godolphin*, O. L. p. 13.

The fact is, the executor was considered as analogous to the heir (hæres) of the civil law, who was so essential to the will, that if no heir was constituted in the instrument there was an intestacy.

distinction between an instrument of this sort and a *donatio mortis causâ*, because, in the latter case, if death does not ensue, (a) the gift must be returned.

Arnold, in reply to the cases.

In *Green v. Proude* the deceased described himself as being very sick in body; the instrument, therefore, had all the appearance of being a testamentary act.

In *Rigden v. Vallier*, the bequest being to take effect after payment of funeral expenses, the *animus testandi* was clearly shown.

In *Corp v. Corp* the instrument, as a contract, was considered as of no effect in the lifetime of the testator, and a special direction concerning the paper was given to his executors and administrators; added to this being between husband and wife it could not be considered as a deed of gift.

Johnson v. Johnson was different in all its circumstances, the instructions were for a will, but the attorney by mistake drew the paper in the form of a deed.

JUDGMENT.

SIR JOHN NICHOLL,

The sole question arising upon the admissibility of this allegation, is, whether the paper propounded is a testamentary instrument, and proper to be proved as such.

Two grounds of objection may be taken, first, that it relates to real property only; secondly, that it declares itself to be a deed of gift, and consequently, cannot be considered as a will.

With respect to the first point, though the property may consist wholly of estates, yet it does not appear to the Court that they may not be estates, disposable as personal property; neither is there any thing to show that some of these estates may not have been sold during the life of the testator, and then he expressly directs "*that all such monies arising therefrom as shall be vested in the funds shall be at Miss Thorold's disposal*;" these monies, therefore, must fall under the description of personal property.

(a) This is clearly the idea the Roman law entertained of this species of donation, "*mortis causâ donatio est quæ propter mortis fit suspitionem: cum quis ita donat, ut, si quid humanitus ei contigisset haberet is qui accipit: sin autem super vixisset is, qui donavit, reciperet: vel si eum donationis penituisset, aut prior decesserit is cui donatum sit.*" Inst. lib. 2. tit. 7, s. 1,

In a subsequent passage the whole doctrine on this head is thus summed up and expounded. "In summâ mortis causâ donatio est, cum magis se quis velit habere, quam eum, cui donet, magisque eum cui donat, quàm hæredem suum," and then the framers of the institutes, as if to adorn and illustrate the conclusions of law at which they had arrived, introduce into their work that remarkable passage from the *Odyssey*, in which Telemachus (in reply to a question put to him by Piræus, whether he would wish the valuable presents he had brought with him from Lacedæmon to be removed to the palace from the place where they had been deposited) thus expresses himself:

Πῆραι', οὐ γὰρ τ' ἴδμεν ὅπως ἔσται τάδε ἔργα
Εἰ κεν ἐμὲ μνηστῆρες ἀγήνορες ἐν μεγάροισι
Λάβρη κτείναντες πατρώϊα πάντα δάσονται,
Ἄντ' ἔχοντασι βούλομ' ἐπαυρέμεν, ἢ τίνα τῶνδε,
Εἶδε κ' ἐγὼ τούτοισι φόνον καὶ κῆρα φυτεύσω,
Δὴ τότε μοὶ χαίροντι φέρειν πρὸς δώματα χαίρων.

Hom. *Odys.* lib. 17. l. 79, et seq.

THIS COURT has always held, that even if it should be *doubtful*(a) whether some part of the property be not freehold, it will grant probate, and for this obvious reason, the probate may be necessary for the purposes of justice, and no evil can arise from the grant of it:—thus, if Miss Thorold takes probate of this instrument, and all the estates are real, the probate of this Court can in no way affect them; but if any part should be personal, or if the land should have been sold and the money vested in the funds, for that part the probate ought to pass, supposing the instrument to be in its nature testamentary; besides, it is difficult to imagine why one party should desire probate and the other party object to it, if all the estate is freehold; since, in that case, the probate could have no effect whatever. There appears, therefore, sufficient ground in the present stage of the proceedings to presume, that there may be property to which the probate may be applicable; but at the same time, if it were perfectly clear that there was no such property, the Court would not entertain any question respecting the validity of the instrument.

The main question, however, is, whether the instrument can be considered as testamentary?

In deciding a point of this nature, the Court always looks to the substance, and not to the form of the instrument; to the intention of the writer, and not to the denomination he affixes to it: it calls itself a deed of gift, but it cannot be valid as such—it is not upon a stamp—it contains no valuable consideration—it might have been revoked during his lifetime, for there is nothing to prevent him from selling the estates; indeed, he expressly looks forward to such an event, for he directs that the monies arising from the sale of them shall be vested in the public funds. This instrument then, cannot, as far as this Court can form any opinion, take effect as a deed of gift: it is not irrevocable, it is only to be consummated by death—not to operate during life; the words are, “I give, after my death:”—death is the event which is to give effect and operation to the instrument. Marriage settlements and contracts are of a totally different nature; they take effect during life.

Many instruments of this kind have been admitted to probate. The case of *Shergold v. Shergold*,(b) decided in the Prerogative, is a stronger case than this, because there something of a consideration (viz. sixpence) was given.

In *Markwick v. Taylor*, administration with a deed annexed was given(c)

(a) In the case of *Durken v. Johnstone by his Guardian*, Prerog. Trin. Term, 1796. Where the question arose on the testamentary schedule of John Durkin, and a considerable degree of uncertainty prevailed as to the nature of the deceased's property. *The Court* (Sir W. Wynne) said, An objection has been taken that this is a real estate, and not within the jurisdiction of the Court, but it is not clear whether it is all real property, or property held only for a term of years: still if the paper *may have any effect* on the estate, I am bound to pronounce for it. This Court is not to judge of the effect; and if it does not appear evidently to be a paper only applying to a freehold estate, it is the duty of this Court to establish it.

(b) *Shergold v. Shergold*, Prerog. 1714. Dr. Walter Pope made a deed of gift to Ann Shergold to take effect after his death, and upon delivery of sixpence *gave, granted*, and put her into possession of all his estates,—administration was granted with deed annexed.

(c) *Markwick v. Taylor*, Prerog. 1722. Markwick made a deed of gift of all his estates, after death, administration with the deed as a testamentary schedule annexed, was decreed by the Court.

In *Hog v. Lashley*, a Scotch settlement, in the form of a contract, was admitted to probate(a).

In *Corp v. Corp*,(b) a paper, entitled a deed of gift, was held to operate as a will. That case was argued at great length, and many cases were cited from the common law to show, that a principle governs all courts to be astute in finding out a mode of giving effect, in one way or another, to an instrument of this sort. They all go on the principle, that the intention of the party is the point to be looked to, and not the form of the instrument.

In the present case, there is not so much difficulty as there has been in others which have been decided. Nothing could give this instrument operation as a deed of gift; it is expressly a gift to take place upon the testator's death. I have no hesitation therefore in admitting the allegation to proof.

(a) *Hog v. Lashley*, Prerog. 1789. A Scotch settlement in the form of a contract, but to take place on the death of one of the contracting parties, was pleaded in an allegation as the last will and testament of the party deceased—it was objected that the instrument was not in its nature testamentary—but the objection was overruled and the allegation admitted to proof.

(b) *Corp v. Corp*, Prerog. 1793. In this case the deed was not to take effect on the death of the writer, but on another contingency, viz. the death of the wife's mother, or the sale of a certain estate—it was entitled "a deed of gift;" the obligatory part was in the following terms, "By this deed I bind myself to give to my wife, either upon the demise of her mother, or the sale of the Yorkshire estate," &c. &c.and it concluded, "I do therefore hereby ordain that my executors, administrators and assigns, consider this deed as the most solemn obligation, in confirmation of which I set my hand and seal." This paper was directed to Mrs. Moore, the wife's mother. The cases cited in argument, were *Rigden v. Vallier*, 2 Vesey, 253; *Kittell v. Lee*, Hobart, 312; *Rowe v. Treemain*, 2 W. Wilson, 75; *Goodtitle v. Bailey*, Cowper, 375; *Green v. Proude*, 1 Keble, (Mod. 117.) *Whittan v. Whittan*, Chan. Cases, 208; *Johnson v. Johnson*, Prerog. 1780.

The Court said, "that it had been laid down in *Goodtitle v. Bailey*, and also in the case in the 2d Wilson, that the instrument, if it cannot operate in one form, may in another, and that it was the duty of the Court to give it effect.

SCOTT v. RHODES.—p. 12.

An unfinished and unexecuted paper established as a will.

THOMAS BURCHALL, one of the clerks of the Bank of England, was found dead in his bed-room, on the morning of the 8th September, 1807, having gone to bed on the preceding evening, apparently in perfect health.

In a box, in which the deceased was in the habit of keeping papers of moment and concern, were found four testamentary writings, of the following import.

(D.) A will, dated August 17, 1793, regularly executed and attested, by which he bequeathed to his wife 2,000*l.* 4 per cents. for life; 1,000*l.* of which are to remain at her disposal, and of the other 1000*l.* 500*l.* to go to Mrs. Whinnell, his wife's sister; 200*l.* to Mrs. Scott, his wife's other sister, or if she died first, to John Scott, her husband, and to their three children 100*l.* each, and appointed Mrs. Whinnell and Mr. Scott executors.

(C.) A will, dated Oct. 5, 1805, regularly executed and attested, by which he left all his property to his wife for her life; at her decease, one half of the property in the funds to be at her own disposal; the other half to go to her sister Mary Scott, wife of John Scott, her children, and their heirs for ever. John Scott and his son Benjamin to be the executors.

(A.) A paper, in the hand-writing of the deceased, of which the following is a copy:—

“This is the last will and testament of me, John Burchall, late of Old Gravel Lane, now of King David Lane, in Shadwell, in the county of Middlesex, gent.

“First, I recommend my soul into the hands of almighty God, through the merits of my merciful Redeemer, the Lord Jesus Christ; and as to my worldly goods and estate, I dispose of them as follows:—

“I first desire my just debts and expenses attending my decease, shall be duly paid; I then leave to my dear sister Mary Scott, wife of John Scott,^(a) of Worship Street, Finsbury, the one half of whatever I may die possessed of in the public funds, and to her heirs for ever. From the other half, it is my wish that one hundred pounds sterling shall be raised, which I leave to Mr. John Scott, as aforesaid; the residue of my property in the funds, I leave to be equally divided between the three children of the said John and Mary Scott,—John William ——— Scott, Benjamin Whinnell Scott, and Elizabeth Scott, and to their heirs for ever. All the rest, residue and remainder of my property, whether real or personal, in possession or reversion, I leave to John Scott, to his heirs for ever, and I hereby constitute the said John Scott and Benjamin Whinnell Scott, the executors of this my last will and testament.

“In witness whereof, I, the said testator, John Burchall, have hereunto set my hand and seal, the — day of August, One thousand eight hundred and seven.

“Signed, sealed, published and declared by the said testator,

“John Burchall, as for his last will and testament, in the

“presence of us, who in his presence, at his request, and in

“presence of each other, have as hereunto, set our hands, as

“witnesses.

L. S.”

(B.) A paper, in substance of nearly similar import to A. and labouring under precisely the same imperfections in point of form, inasmuch as it was not signed, and had a clause of attestation, but was not witnessed. This paper was also, throughout, in the hand-writing of the deceased.

(A.) was propounded as containing the last will and testament of the deceased, by Mr. Scott, the executor named in that paper. It was opposed by Ann Rhodes, the cousin-german and one of the next of kin to the deceased, who prayed the Court to pronounce for an intestacy.

In support of paper (A.) several witnesses were examined, who deposed in strong terms, to the unvarying affection the deceased entertained for Mr. Scott and his family, (who were his wife's nearest relations) and to declarations repeatedly made by him of his intention of bequeathing his property to them.

(a) His wife had died subsequent to the date of C.

To account for the unfinished state of the paper, Charlotte Milnes, who lived in the neighbourhood of the deceased, and who used to come every morning to do his household work and return to her own home at night, deposed in substance as follows:

That the deceased had no (a) business whatever of his own, but was in the habit of doing any little writing, such as making out bills and writing letters for persons who could not write. That about ten days or a fortnight before his death, she observed him employed in writing that which she supposed to be his will: that he had the whole leaf of the table up, and had several writings on large sheets of paper before him, quite unlike bills or letters: that he desired the defendant to tell Mr. Raffle, (for whom he was in the habit of writing letters,) if he should call, that he the testator was out, and at the same time said, that he was so much taken up with other people's concerns, that he could not do what he had to do for himself; and seemed rather soured in his temper, and the daughter of Mr. Raffle having accordingly called that afternoon, the deponent told her the testator was not at home.

That the deceased continued writing for some considerable time, for he was extremely slow, and always made a draft of what he wrote, but as she cannot write she is unable to depose with certainty, though she does verily believe that it was in writing his will that he was at such time employed:—

That on the Monday next before the Wednesday on which *the deceased died*, she again saw him writing, with the same kind of papers before him, and she verily believes that he was then completing his will, but cannot depose with certainty thereto.

That on the night before the deceased died, he being then very well and quite cheerful, told the deponent that he meant to go the next day to Apothecary's Hall, and would make it in his way to call on Mr. Scott, *whom he wished very much to see*.

That the testator died quite suddenly, for he had not been confined by any illness, and on the very day preceding his death he was in good health and spirits, and walked out as usual in the fields towards White-chapel, and in the evening she left him about half past nine as usual.

She then proceeded to detail the circumstances of her finding him the next morning dead in his bed-room, but dressed, and concluded by saying, that she verily believed that the deceased was by his sudden death deprived of carrying his intentions into effect by a formal execution of his will, for she has not the least doubt but that if he had called upon Mrs. Scott on that day, he would have put a finish to his will by executing the same.

Swabey and Adams in support of the paper.

Arnold and ——— for the next of kin.

JUDGMENT.

SIR JOHN NICHOLL,

In support of this paper the executor has pleaded, and fully proved, that the deceased entertained the greatest regard for Mary Scott, who was his wife's sister, and her husband John Scott; that he had declared

(a) This must be understood with reference to private business, as he was in daily attendance at the Bank, where he transacted business as one of the clerks.

that it was owing to the advice of John Scott that he had acquired his property, and that after the death of his wife he had repeatedly said, that Mary Scott and her children and John should have all that he had; other declarations even stronger than these are spoken to. It also appears that he kept up no intercourse with his own relations, that he never mentioned any relations, and possibly did not know that he had any living.

It is the less necessary to dwell upon this part of the evidence, because there are acts of the deceased, before the Court, which always afford more satisfactory proof of testamentary intention, than declarations. Declarations may be loosely made, and are always liable to be misapprehended or incorrectly represented.

On the 17th of April, 1793, the deceased executed a will, in which his wife and her relations were the sole objects of his bounty, and there is no mention of any relations of his own.

On the 7th of October, 1805, he made another will; by this the whole of his property was given to his wife for life; half to be at her disposal, the other half to Mary Scott, John Scott, and their children.

In November 1805, the wife is stated to have died; this naturally led to a new will; and from the contents of the former wills it would be probable that John and Mary Scott and their family would be the parties solely benefitted.

It is pleaded that in 1807, the deceased prepared the paper B. as a draft for the present will; it is indeed for the most part word for word the same as the instrument propounded; the only evidence applying to it is, that it is in the hand-writing of the deceased: it is dated in 1807; but in what month of that year it was written the paper does not import; not even whether it was prior or subsequent to the instrument now propounded. That it was the draft of his will is by no means made out; nor is it, I think, at all probable that it should have been; it is, if any thing, more formally prepared than B, and there is a bequest over of the residue to the children in these words:—"All the rest, residue, and remainder of my property, whether real or personal, in possession or reversion, I leave to the said John and his heirs for ever, and in the event of his previous decease, to his said children as above, or the survivors of them, or their heirs for ever." These latter words are omitted in the paper propounded, and it is not probable they would have been omitted if B. had been the draft of it.

B. then is not only the more full of the two, but if any thing, the more formal; it is written as fairly, it has paper on a wafer both for the deceased and the witnesses to seal; it is in every respect an instrument prepared and ready for execution, and varying in some degree, it should seem, as if it was not intended as a duplicate. It would therefore be extremely difficult to ascertain, if it were necessary, which of these two papers was last written.

All these testamentary acts, however, serve strongly to point out what were the testamentary intentions of the deceased, up to August 1807; and as far as evidence of this sort can go, they do most forcibly support the instrument propounded.

But evidence of this sort, however strong, is not sufficient. The paper propounded was manifestly intended to be executed by being subscribed, and to be attested by witnesses. And however clear the proof may be that at the time the deceased wrote this paper he intended so to

dispose of his property by will, yet it being equally clear that in order to give effect to the instrument he intended to do the further act of signing in the presence of witnesses, the law requires it to be shown why the further act was not done.

Only one witness has been examined to these important facts; but if that witness is to be believed, and there is nothing to discredit her, she proves a case much more favourable to the support of the paper than the plea itself. And from the testator's habit it is not probable that more witnesses could have been produced to this part of the case. She says that the deceased had no business of his own; and yet from his conversation it was only on his own affairs that he was employed, and therefore it was probable that it was about his will. The description of the size of the paper agrees with these instruments, and confirms their identity. The time of writing, which was ten days or a fortnight before his death, corresponded with the date of the paper A. which was in August.

The last time when she saw him writing was on the *Monday* next before the *Wednesday* on which he died; and whether he was then quite completing A., or whether, (which is more probable) he was then writing B., it brings the act down much nearer to the deceased's death than is stated in the plea(a).

My predecessors in this place have held the rule strict that the proof must show a continuance of intention, and that the deceased was prevented from completing the instrument, by the act of God: it is my duty to tread in their steps, and to adhere to those principles which they have laid down. I am not at liberty to depart from them in any instance if I were so inclined; but there is no point upon which I should be less inclined to do it, than upon that now under consideration. I am strongly impressed with the necessity of applying the rule strictly and with firmness.

In this case it may be said, that on the *Tuesday* the deceased was well, walked out, and would have executed his will; but the continuance and progress of his intention is proved, and the presumption of abandonment is repelled by what the witness states, "that on Tuesday night the deceased said he should call on Mr. Scott the next day, and wished much to see him. Now, connecting this with the fact that the two former wills were executed at Mr. Scott's house, that this instrument was only completed on the day before, and that he was anxious to see Mr. Scott, is it not highly probable that his purpose was, on the very next day to go to Scott to execute this will? and, dying suddenly before the next day, this comes up strictly to the case of the execution being prevented by the act of God.

It might be conjectured that the deceased got up early the next morning (which from the circumstances he appears to have done) in order to go to Mr. Scott's before he proceeded to his accustomed occupation at the Bank; this, however, would be mere conjecture.

(a) This cause first came before the Court in Trinity Term, 1808, when the admission of the allegation propounding paper A. was opposed, and the then Judge of the Prerogative Court, (Sir William Wynne,) after stating how strictly he held to the rule he had always endeavoured to enforce as to the execution of testamentary papers, where formal execution appeared to have been intended, expressed nevertheless his opinion that if the facts laid in the allegation should be proved, the instrument would be entitled to be established as the last will and testament of the deceased.

Upon the whole, there being such clear proof of long intention to give the whole of his property to this family—not the slightest appearance of any intention to benefit his relations—no ground to suspect any hesitation or doubt in the deceased's mind, the will having been prepared for execution so short a time before his death, and the continuance of intention being brought down to the very day when the act of God intervened and prevented the execution of the instrument, I think that I am departing from no principles which have governed this Court, in pronouncing this paper to be the will of the deceased; and I do accordingly pronounce for it.

RYMES v. CLARKSON.—p. 22.

Probate of a codicil written in pencil, and which had been in possession of the executor upwards of three years, called in and revoked.

LUKE HALL put a period to his existence on the 21st of May, 1804, having been deranged in his intellects for the last twelve months immediately preceding his death; probate was taken of his will, and four codicils, by Clarkson, one of the executors, on the 11th of September, 1804.

On the 25th of June, 1808, Rymes, another of the executors, called in this probate, and cited Clarkson to show cause why the second codicil written in pencil should not be revoked; Clarkson declined contesting the suit, but the codicil was propounded in an allegation by Joseph Hall, a legatee, under the instrument.

This allegation pleaded in substance,

1st, The death of Luke Hall, and then enumerated the several relations entitled in the distribution of his property, if he had died intestate, but stated that he had left a will and four codicils.

2ndly, That the deceased, several years previous to his death, took his niece, Sarah Vowell, to live with him. That Sarah Vowell intermarried with William Clarkson in 1800. That from that period the deceased principally resided at or near the house of Richard Clarkson, at Kingston; and that about twelve months before his death he was attacked with a depression of spirits, and then, for the first time, showed symptoms of derangement.

3dly, That some time between the 27th of March 1800, (being the date of the first codicil,) and the commencement of the deceased's derangement, he did, with his own hand, write in pencil the very codicil propounded, and at the time of his writing it was of sound and disposing mind.

4thly, That before the executor took probate of the will and four codicils, a true copy of the second codicil, duly collated, was made and deposited in the registry.

5thly, That when Clarkson applied for probate as executor, he was advised, that in consequence of the informal manner in which the said codicils were written, the consent of Joseph Hall, Nathaniel Hall, and Sarah Clarkson, respectively mentioned in the codicil in pencil, was requisite previous to obtaining probate, and he accordingly applied to Joseph Hall and Sarah Clarkson for their consent, and that Sarah Clarkson, then in the presence of Richard Clarkson her husband, assured Joseph

Hall that the codicil and memorandum in pencil had been written by the deceased long prior to his having shown any symptoms of mental derangement, and declared, *that she had frequently seen the will and codicils prior to that time; and, as she observed the codicil to be written in pencil, had advised the deceased to send the same to his attorney, to have them more formally written;* and she further declared, and has frequently declared to others, that the deceased was perfectly sensible at the time he wrote the codicil and memorandum in pencil.

That Joseph Hall and Sarah Clarkson executed proxies, whereby they consented that the probate of the codicil and memorandum in pencil should be granted to Clarkson, with the will and the other codicils, and that Nathaniel Hall being abroad, a decree issued against him, to show cause why the probate should not be granted to Clarkson.

That Rymes and Clarkson had respectively, since the grant of the probate, and before February 1806, when the Master of the Rolls delivered his opinion on the construction of the second codicil, in a suit instituted on behalf of the children of Joseph Hall against Richard Clarkson, for the recovery of their legacies, *on various occasions spoken of the second codicil in pencil, as the act of the deceased while he was of sound mind.*

*The will bore date the 10th of March, 1798, and was regularly made and attested by two witnesses. By it the testator bequeathed a variety of legacies to his numerous relations and friends, of which it will not be necessary for the purposes of the subsequent argument to enumerate more than the following, "Item, I give and bequeath to my brother Joseph Hall, of the city of Bristol, in consideration of his having a large family, 1000*l.* Item, I give and bequeath unto each of the children of my brother Joseph Hall, who shall be living at the time of my decease, 50*l.*"*

He left his niece "Sarah Vowell (who had since become Mrs. Clarkson,) 1000*l.* and also appointed her residuary legatee. His brother William Hall, John Olding,^(a) banker, and Samuel Rymes, were the executors."

The will also contained a provision "That if by any unforeseen event his estate and effects should not be competent to answer and pay all the legacies therein before given, that then and in such case each and every of the legacies should sustain a proportionate loss or diminution, upon their several and respective legacies."

*The first codicil was of the 27th of May, 1810. By this, amongst other small bequests, an additional legacy of 500*l.* was given to his brother Joseph Hall; and Richard Clarkson was appointed one of his executors, in the stead of William Hall. This instrument was signed and sealed, but not attested.*

The second codicil, the subject of the present litigation, was written in pencil, at the foot of the first, and was as follows:

*"Instead of leaving 2000*l.* to my brother J. personally, I wish to leave the same sum to him and his children. N. Hall's legacy of 500*l.* I wish to leave to my brother D. Hall's children, after the decease of N. H. and his wife. Instead of 1000*l.* to Mrs. C. as in my will, I wish to leave 3000*l.* in trust for the use of Mr. and Mrs. C. during life, and at their decease to be equally divided among their surviving children, at the same time leaving Mrs. C. residuary legatee."*

(a) John Olding died before this suit was instituted.

This was neither signed nor dated.

The third codicil was in the hand-writing of the deceased, and thus expressed :—“I know my dear niece Mrs. Clarkson will scrupulously attend to every request of mine respecting the disposal of my property as though mentioned in the body of my will: it is my wish that mourning rings may be sent to those friends that she knows I valued and lived in habits of intimacy with, such as my friends Mr. and Mrs. Olding, Mr. and Mrs. Martin, my partners, with their wives, Mr. Samuel Shaw, &c. And it is further my request, that if Miss Sarah Reeve should be living at the time of my decease, Mrs. C. would give her a sum not exceeding 50*l.* and that to depend on her situation and character at the time. And I further hope and depend on it, that Mrs. C. will be kind enough to occasionally see that my unfortunate *little child* Marianne Wall, is taken proper care of, and educated in such a manner as to become an useful member of society, and that she is placed in proper hands: if the mother conducts herself virtuously and well, she is the fittest person to have the care of her, but by no means otherwise. Should the interest of the property I have left the child not be adequate to her support, I doubt not Mrs. C. will with pleasure contribute something more towards her support, rather than have the principal broke in upon. I expect and hope my dear Mrs. C. *will have at least three thousand pounds*, after all my debts and legacies are paid; with my best wishes for her happiness, and that of her dear partner and children, I sign this.

“18th March, 1802.

L. HALL.”

The fourth codicil left 1000*l.* consols, in trust, to the executors, for Marianne Wall, which if she died before she attained the age of 21, was to fall into the residue; it concluded thus:—“I declare this to be a codicil to my will; witness my hand this 12th day of May, 1802.

L. HALL.”

At the bottom of it was written in ink, “I had left Marianne Wall, mother of the above named child, a legacy, but have since cancelled it, finding her conduct to be such (from a dreadful habit of lying which she has contracted, &c.) as to render her unworthy of my esteem, and it is my wish, if possible, to keep her ignorant as to the residence of her child that she may never have the least influence over her.” And then followed *in pencil*,

“Instead of the above one thousand consols, to be one thousand pounds.”

Adams and Barnaby in opposition to the allegation.

The question at issue is whether this paper is deliberative, or dispositive? on the face of it it appears to have been intended as a mere memorandum; and this idea of its character is confirmed by the deceased's habits of business and regularity, which are clearly evidenced by the several testamentary instruments before the Court. Besides, the paper itself contains no dispositive words; it merely expresses a wish; whereas in all his other testamentary writings there are the words “I give and bequeath.” A simple wish can never have the effect and validity of a bequest. The codicil too is imperfect; it has neither date nor signature; it contains only the initials of the names of those persons whom it is supposed the testator intended to benefit; in this also the contrast is striking, for all the other codicils are dated and signed. Add to this too, it is written only in pencil.

COURT—"What would be the effect of it, should it be proved that this paper was written at the same time with the pencil memorandum in the third codicil?"

Argument resumed.

Even then it would be liable to all the objections arising from its obvious imperfection. Besides, we are given to understand, that a question is now pending before the Court of Chancery for the purpose of ascertaining whether these legacies are accumulative; and if the Court of Chancery should, as it is to be apprehended it will, pronounce that they are to be so considered, they will be at complete variance with the intentions of the deceased and the whole disposition of his property, inasmuch as there will not be assets sufficient to discharge the legacies, and nothing can be better established than his intention to benefit the residuary legatee.

Arnold and Swabey contra.

The admission of this allegation has been opposed on various grounds, viz. as to the material with which the codicil is written, as to the form of words in which it is drawn up, and as to its repugnance both to the circumstances and habits of the testator, and to his acts as they stand before the Court.

With respect to the material; it cannot be denied but that a man may write his will with any material he pleases: it may be imprudent to write it with a material liable to easy obliteration; but a will written in pencil is as valid as a will written in ink, and so is a codicil. The material may be a circumstance to guide the Court in deciding whether the deceased intended it as a final disposition or not? but standing by itself it cannot be questioned: if, for the sake of argument, the presumption is admitted, that if a man has written all his other testamentary acts with a more durable material, that which is written in pencil is not of equal weight; still if the party has done other testamentary acts in pencil, which stand undisputed, then that presumption falls to the ground. Though done with an unusual material, it is not done with an unlawful one, since by the law of England the greatest possible latitude is allowed in this respect; a will in chalk or slate is a good will; it may be written quocunque modo velit, quocunque modo possit; the testator may, like the Roman soldier, write it on the ground with his sword. (a)

Again, it is said that this paper has not the formalities which make it a solemn and perfect instrument; that it has neither date, attestation, nor seal. To this we reply, that it is in the hand-writing of the testator, and that therefore the Court is bound to receive it without those formalities.

As to the time at which it was written, if we were left to conjecture we should submit that there were good grounds for supposing that it was

(a) "Quanquam militum testamenta juris vinculis non subjiciantur cum propter simplicitatem militarem quomodo velint et quomodo possint ea facere his concedatur." Cod. lib. 6: tit. 21. sec. 3.

The Roman soldier was indulged with very peculiar privileges and immunities in making his will: it is presumed that this part of the argument has reference to the following passage in the Code. "Proinde sicut juris rationibus licuit, et semper licebit, si quid in vaginâ aut clypeo literis sanguine suo rutilantibus adnotaverint, (milites) aut in pulvere inscripserint gladio suo ipso tempore quo in prælio vitæ sortem derelinquunt, hujusmodi voluntatem stabilem esse oportet." Cod. lib. 6. tit. 21. sec. 15.

subsequent to the other testamentary acts; and at that time when the pencil writing was added to the other codicil, consequently that it was written upon a revision of all that he had done before; with respect however to this, it is no otherwise really material than that, in order to give it validity, it must be proved to have been written during the time that the testator remained of sound and disposing mind.

The words of the paper have been objected to; but we conceive it cannot be denied, that any words of bequest which state the inclination of the deceased's mind, have been determined to have the effect of direct dispositive words. A will may be good without dispositive words, where the testator has not made the whole of his will in these words; the Court will look to his intention and to his acts.

It is said that the words are equivocal, and we admit that they are not so dispositive as "I give and bequeath." "I wish," generally speaking, is indicative of the will without the power of giving; but when the person wishing has the power as well as the inclination, when he has stated the inclination he is to be considered as having done the act.

Again, it is objected that the party might have put this into the same form that he has put the other codicils. To this we reply, that we are to presume that he knew what the law was with respect to the disposal of his personal property, and that his will thus expressed would be operative. Further, it is contended that the deceased does not give a correct description of the acts he wished to do; this would found something of an argument against his capacity; but we contend the description is not so varying and incorrect as would lead to the conclusions assumed by the other side; though inaccurate, it is not such an inaccuracy as the Court would consider of importance. He recites the legacy to Hall correctly, and afterwards gives the benefit to his other brother's children in remainder. But then the counsel on the other side, assuming the hypothesis that the legacies are accumulative, say that there would be no residue; we maintain that the argument may be taken the other way, that the deceased doubted whether he had sufficient property to carry into effect what he intended; he was in trade, and his property subject to contingencies, and even if his legacies were to suffer a pro rata diminution, still the principal object of his bounty would have the largest proportion. It is then argued, that as the legacies must be taken cumulatively there would be no assets. This might be an argument against their being considered as accumulative; but the door cannot be opened to that argument till the Court has declared whether the paper is testamentary or not. This Court has only to consider whether the paper is in such a form as will entitle it to probate: it is for another court to decide what will be the effect of it.

The fourth article of the allegation has been opposed as pleading facts which will not aid the case, inasmuch as they are not the acts of the testator; they are acts however not without their weight, and, from their bearing on the present suit, extremely material to be brought to the notice of the Court.

The Court took time to deliberate.

JUDGMENT.

SIR JOHN NICHOLL,

As the decision of the Court respecting the admission of the allegation may probably dispose of the whole case, I have been induced to consider

it maturely: and it may be necessary also that I should state fully the conclusions at which I have arrived.

It has been truly said, that the allegation goes little, if at all, further than to plead that the deceased was of sound mind when the paper in question was written. The date is not attempted to be fixed nearer than three years; it contents itself with pleading, that it must have been written after the 27th of March, 1800, and before his derangement which took place in May, 1803.

The Court has endeavoured to ascertain, and has put it to the counsel to say, whether from the internal evidence arising from the papers, it could at least be fixed whether it was written before or after the two codicils of 1802. But there is nothing on this point beyond mere conjecture; the time is left at large for upwards of three years, nothing to show whether it was written after the codicil of 1800; whether at the same time as the memorandum at the foot of the codicil of May, 1802, or whether it was at some later and different time: the allegation pleads neither any declarations applying to it, nor any recognition of it. The fifth article indeed sets forth some declarations of Mrs. Clarkson the residuary legatee, and of the executor, but not of the strongest sort; they merely go the length of stating, that the paper was written prior to his derangement, and that she had advised the deceased to send to an attorney to have it more formally executed. But there is no averment that the deceased declared that this pencil writing was sufficient in its present form, and that he intended it should operate in its present state, nor any thing to that effect; still less is there any attempt to show that the deceased had not full opportunity to write it in a more formal and complete manner, as he had done the other codicils.

Some question has been made whether the declarations of Mrs. Clarkson are admissible evidence? It has been said, that she may be examined against the executor opposing the codicil, as a witness; if so, her declarations cannot be pleaded. But there are some doubts (which it is not necessary to decide) whether either her declarations or her depositions can be taken as evidence; she is a legatee under the codicil; and if the assets should fail, she may be more benefitted as legatee under the codicil, than as residuary legatee under the will. She is also the wife of the executor, who has taken probate; and can the wife of the executor be examined as a witness?

The main, however, and indeed the sole question is, what is the description of the paper? And what was the intention of the deceased respecting it? Did he write it and intend it as a memorandum, concerning which he was to deliberate, and in case he should come to a final determination, to make these alterations and additions, and thence to draw up a fuller and more formal paper? Or had he already come to that *final resolution*; and did he write this paper meaning that it should operate in its present form, and having no intention to do any further act to give it effect? For I take it to be the duty and very function of the Court of Probate to decide *quo animo* the paper was written, was it *animo testandi*, or only something preparatory to his final disposition? This was the doctrine the (a) Court of Review held in *Matthews v. War-*

(a) When, then, at what period, did the *voluntas testandi* exist in his mind quoad this instrument? It is admitted, as it must be, that when he subscribed his name, he was looking to some future act; the decision that this is his will, would

ner, though the paper in that case was signed and dated, and expressly termed "this (b) my will." Now the intention of the testator in this respect can only be judged of and decided upon from due consideration of all the circumstances before the Court. It has been objected, that it is written in pencil; to this it has been replied, that the deceased had a right to write his will with a pencil, or to write his will and three codicils in ink, and a fourth in pencil; and so he has undoubtedly, and it would be valid in law, provided the Court could be satisfied that he intended so to do. For instance, if he had added, I have written this codicil in pencil, but intend it shall operate as my will; or if it could be accounted for by showing that he had no other materials, as it was permitted to the dying soldier to write his will with his sword in the dust. But when the question to be decided is the previous one, whether he did intend this paper as the final declaration of his mind, and as a codicil, or whether it was merely preparatory to a more formal disposition? the material with which it is written becomes a most important circumstance, and the importance of it is still further increased when the Court sees that the deceased made other codicils, all formally written in ink, one before this paper, others possibly after it. Then the natural and rational conclusion is, that this was a mere memorandum for future deliberation, and not a finished instrument intended at all events to become a part of his will, or, as far as it goes, to alter and controul both that previous will, and a codicil regularly executed.

Secondly, the same course of reasoning applies to its being neither signed nor dated. It is said that the law neither requires subscription nor date: this would be perfectly true if there had been other proof that the deceased intended it, as a final testamentary act. But when we are engaged in an inquiry whether it is finished or incomplete, the want of date and signature is also exceedingly important.

The third objection taken is, that the paper is not in dispositive terms. To this it has been answered, that terms of wish and request are frequently construed imperatively, and that in the paper of the 18th of March, about which there is no question, the same expressions are used. The answer may be true, but it does not remove the pressure of the objection upon the real point in the case: The natural and usual terms which a person adopts when he writes a paper intended as his final testamentary disposition are, "I give," or "I bequeath," not I wish to give: and although in the paper of the 18th of March, the same expressions are to be found, yet that very paper is rather a confidential expression of his wishes, addressed to his niece Mrs. Clarkson, than a formal codicil; but in the two formal codicils of the 27th of March, 1800, and that of the 12th of May, 1802, the terms are dispositive, "I give," "I bequeath." The objection therefore, though not of the most powerful cast, has nevertheless a bearing upon the consideration of the question whether this was intended as a final operative paper, or whether it was a loose memorandum for future consideration.

destroy the most general maxim I know of, *voluntas testatoris ambulatoria est usque ad mortem*. See *Ld. Chancellor Rosslyn's judgment, Vesey, Jun. Vol. IV. p. 210.*

(b) "I appoint my good friend Mr. Edward Epine, and my good friend Mr. Edward Johnson, my Executors, to see this my last will and testament complied with. Dated at Deptford, 2d Oct. 1785.

WM. MATTHEWS."

Vesey, Jun. Vol. IV. p. 186.

Fourthly, The same inference is to be drawn from the inaccurate manner in which the paper refers to the bequests in the will: the words are "*Instead of leaving 2000*l.* to my brother J. personally, I wish to leave the same to him and his children.*" whereas the fact is, that he has left his brother J. 1000*l.* by his will, and 500*l.* by a codicil. This inaccuracy is rather characteristic of a loose memorandum than of an instrument finally and deliberately intended to operate. In this, as in some other passages, persons are only described by their initials: this again tends to the same conclusion.

Fifthly, It has been stated, that if this paper should be established, the legacies will become accumulative; and if they are accumulative, that then the residue will fall considerably short of 3000*l.* to which extent it is obvious the testator intended to benefit Mrs. Clarkson. To this it has been truly answered, that if the deceased has made a will producing an effect different from his intention, the Court of Probate must nevertheless establish that will. But the question is upon an imperfect informal paper; the evidence of intention from extrinsic circumstances is let in, and the Court only establishes a paper labouring under such imperfection and informality for the purpose of carrying into effect *intentions clearly established*. In this instance, however, it is not clear that the effect suggested would be produced; either that the legacies would be accumulative; or, that if they should be so considered, that the residue would be insufficient: and therefore the Court does not rely upon this argument. But the consideration at least may, indeed ought in all instances, to go to the extent of putting the Court of Probate extremely on its guard against pronouncing for informal papers, which are to operate in conjunction with a complete will and codicil; if it were otherwise, it might happen that when these papers came to be construed together in another court, instead of carrying into effect the wishes and intentions of the testator, they might produce an effect totally contrary to them. Great caution therefore should be observed, and the Court should clearly be satisfied that the testator intended the paper should make a part of his will; and that, once established, it cannot look to the effect.

Upon the whole of this case, the Court is of opinion that this instrument is to be considered as an incomplete, imperfect, and unfinished paper.

The testator had executed a complete formal will: he had added two codicils regularly drawn up by himself and fairly transcribed, to which he had affixed his signature. Considering, therefore, that the paper now propounded is a mere writing in pencil, on one of the instruments, not dated, nor signed, describing persons by initials, and not even referring correctly to the will, it appears to be a mere loose memorandum of something that passed in his mind, at the moment he was writing, and which possibly never again recurred to his recollection. And when the allegation propounding this paper offers nothing in support of it, beyond the mere handwriting and sanity of the testator; states no circumstances that can fix the date, or show whether it was written four years before his death, or a few days only previous to his insanity; and in no manner whatever accounts for the imperfect form in which it is produced; I am of opinion, that the circumstances in the plea, taken in conjunction with the paper, would not be sufficient, if proved, to establish the codicil, and therefore I must reject the allegation.

SANDFORD v. VAUGHAN and Others.—p. 39.

An allegation propounding four papers, as containing together a will, admitted to proof.

An allegation, propounding an imperfect and unexecuted paper, rejected.

SIR JOHN CHICHESTER, Bart., died on the 30th of September, 1808, possessed of large landed estates, and personal property to a very considerable amount. He left the following papers of a testamentary import.

No. 1. “I Sir John Chichester, of Upper Grosvenor Street, in the county of Middlesex, do give and bequeath to my friends, hereinafter mentioned, the following legacies, to be paid out of my personal estate, within one year after my decease. To the Rev. John Sanford, of Sherwell, the sum of ten thousand pounds sterling money, together with my furniture, in Grosvenor Street, and at Wickham in Kent, plate excepted. To the Rev. Thomas Hole, of George Ham, in the county of Devon, five thousand pounds. To the Rev. Henry Hutton, of Guy’s Hospital, five thousand pounds. To the Rev. Thomas Boyce, of Brendon, in the county of Devon, one thousand pounds. To the Rev. Charles Davie, of Heanton, in the county of Devon, one thousand pounds. To my servant, Robert Belringer, the sum of seven hundred pounds. *To all my other servants, two years’ wages;* except Margaret Phillips, to whom I give an annuity of thirty pounds a year, during her life. To Nicholas Mackin, late servant to my father, thirty pounds a year during his life. To Mr. Thomas Hole, son of the Rev. Thomas Hole, the sum of one thousand pounds. To Mrs. Pilcher, daughter of the said Thomas Hole, one thousand pounds. To Mrs. Vaughan, Mrs. Fry, and Mrs. Edwards, daughters of my late uncle William Chichester, five hundred pounds each. To Charlotte and Jane Sanford, daughters of the late John Sanford, of Ninehead, three thousand pounds each.

“27th May, 1808.

JOHN CHICHESTER.”

No. 2. “I, Sir John Chichester, of Upper Grosvenor Street, in the county of Middlesex, do give and bequeath to my friends, hereinafter mentioned, the following legacies, to be paid out of my personal estate, within one year after my decease.

“To the Rev. John Sanford, of Sherwell, in the county of Devon, the sum of ten thousand pounds sterling, together with my furniture, in my houses in Upper Grosvenor Street, and at Wickham, plate only excepted. To the Rev. Thomas Hole, of George Ham, in the county of Devon, five thousand pounds sterling. To the Rev. Henry Hutton, of Guy’s Hospital, five thousand pounds. To the Rev. Thomas Boyce, of Brandon, in the county of Devon, one thousand pounds. To the Rev. Charles Davie of Heanton, in the county of Devon, one thousand pounds. To Mr. Thomas Hole, son of the Rev. — Hole, one thousand pounds. To Mrs. Pilcher, daughter of the said Thomas Hole, one thousand pounds. To Mrs. Vaughan, Mrs. Fry, and Mrs. Edwards, daughters of my late uncle William Chichester, five hundred pounds each. To Charlotte and Jane Sanford, daughters to the late John Sanford, of Ninehead, three thousand pounds each. To my servant, Robert Belringer, seven hundred pounds. To my servant, Margaret Philips, an annuity of thirty pounds a year, during her life. To Ni-

cholas Mackin, servant of my late father, an annuity of thirty pounds a year, during his life. And I appoint the aforesaid John Sanford, clerk, my executor. In witness whereof I have hereunto set my hand and seal, this twenty-eighth day of May, one thousand eight hundred and eight.

“Witness

JOHN CHICHESTER, L. S.

“ABRAHAM SCOTT.

“May 29th, 1808.

“I give to Mr. Scott, of St. Alban's Street, five hundred pounds.

“JOHN CHICHESTER.”

No. 3. “Whereas I have, by a paper signed and sealed by me, dated the twenty-eighth and twenty-ninth days of this instant May, given several legacies to persons therein described; Now I do hereby give to Mr. William Sanford, of Bond Street, wine merchant, the sum of 3000*l*. To Mrs. Jekyl of Bath 1000*l*. To Elizabeth Sanford of Bath, spinster, 1000*l* and to Major Sanford of Bath 1000*l*. To Mrs. Standard, daughter of Mrs. Mason, 100*l*. To Mr. Abraham Scott 500*l*. in addition to the 500*l*. that I gave to him by the paper signed by me, the 28th day of this month. I give to Sir Henry Oxenden, of Broome, in the county of Kent, Bart. to the dowager lady Langham of Wimbledon, and to my friend Dr. Bridges of Clifton, each, a ring of the value of fifty guineas as a small token of my remembrance. Witness my hand and seal this thirty first day of May, one thousand eight hundred and eight.

“JOHN CHICHESTER, L. S.

“Signed and sealed in the

“presence of

“S. HARMAN.”

“As I have this day given directions to Mr. Harman to prepare a will for me, disposing of my paternal and maternal estates: but lest I should die before the same can be got ready for my signature, I do hereby give all the timber growing upon the estates of my mother, which I inherit from her, that is fit and proper to be cut down, to George Chichester Oxenden, second son of Sir Henry Oxenden, Bart. for his own absolute use and benefit.

“JOHN CHICHESTER.

“Witness

“S. HARMAN.”

No. 4. “I give my estate of Ashton, in the county of Devon, to George Chichester Oxenden, second son of Sir Henry Oxenden, Baronet, of Broome, in the county of Kent.

“I give the house in Seymour Place, for which I have given a memorandum of agreement to purchase (and which is to be paid for out of timber which I have ordered to be cut down) to the Rev. Dr. Sandford, of Sherwill, in Devonshire.

“Signed Sept. 3, 1808.

“JOHN CHICHESTER, L. S.

“In the presence of

Thomas Humby,

Wm. Williams,

Charlotte Whitehouse.”

No. 5. The draft of a will of very considerable length, interspersed with frequent interlineations and erasures, and concluding thus:

“In witness whereof I have hereunto set my hand and seal; that is to say, my hand to the ——— sheets thereof, and my hand and seal to the last sheets thereof, this ——— day of ———, in the year of our Lord, 1808.”

Then followed an attestation clause, but not subscribed by witnesses.

No. 6. A fair copy of the last-mentioned paper prepared for execution.

An allegation was brought in on the part of the Rev. John Sandford, the executor named in No. 2, propounding 1, 2, 3, and 4, as containing together the last will and testament of the deceased.

Swabey and *Phillimore*, for the next of kin.

Arnold and *Adams* for the executor.

JUDGMENT.

SIR JOHN NICHOLL.

The ultimate question will be, Whether these four papers can stand as the will of Sir John Chichester? But that rests on very different ground from the point which is more immediately before the Court; viz. whether I can, in the present stage of the cause, decide that one of them must be rejected.

In order to establish the four papers, the Court must be satisfied that it was the intention of the deceased that all of them should compose his will: supposing therefore, that no other facts should be proved than those which are stated in this allegation, the Court will have very little difficulty in deciding, that No. 1 cannot form a part of the will.

No. 2 is almost verbatim a transcript from No. 1; it is of posterior date, and contains the appointment of an executor. It is true that it omits legacies to several servants which are to be found in No. 1; but it is to be observed, that No. 3, a paper regularly signed and attested, has a direct reference to No. 2, but none to No. 1.

If the Court were bound to decide on these circumstances, it would consider No. 1 as the mere draught from which the more formal will was made; and I take it to be quite clear, that, where instructions are subscribed as preparatory to a will, the execution of that will entirely supersedes the instructions.

It might be dangerous to send both these papers to a Court of Construction, lest they should be considered as doubling the legacies: that they were not intended to be cumulative is evident from this, amongst other circumstances, that there is a specific legacy of the same furniture in both instruments; if both papers were intended to operate, this bequest would never have found its way into the second paper.

It is not, however, necessary, to decide this point now; but I have thought it material to state my present impressions, in order that the parties may be able more perfectly to instruct the cause.

I see no objection to let it stand in the allegation, that the deceased, with his own hand, wrote No. 1: I am not bound, on that account, to pronounce for it. Facts may come out upon the examinations of the witnesses, which may put the case in another light; but, if the Court sees them in the same point of view in which they now appear, it will not pronounce for it.

Upon this understanding I admit the allegation to proof. [See post.]

ANOTHER allegation was offered on a subsequent day, in this cause on the part of James Buller, Esq. William Ashford Sandford, Esq. and the Rev. Thomas Hole, three of the executors named in No. 5, (a) for the purpose of propounding that instrument as the last will and testament of the deceased.

This allegation consisted of fourteen articles, and detailed a variety of circumstances which had occurred within the four last months of the deceased's life to account for the unfinished state of the instrument.

Swabey and *Phillimore*, for the next of kin, contended that the allegation was objectionable both as to form and substance;—as to form, on account of the vague and diffuse style in which it was drawn up;—as to substance, inasmuch as if all the facts contained in it should receive the most full and ample proof, they would, nevertheless, be utterly insufficient to establish No. 5. as the will of Sir John Chichester.

Barnaby and *Stoddart*, on the behalf of the executors named in No. 5, argued for the admissibility of the allegation.

JUDGMENT.

SIR JOHN NICHOLL.

The question which the Court has to decide, is, Whether this allegation is admissible? Objections have been taken both as to the form and substance of it: it is said to be too diffusely drawn—and so undoubtedly it is; many circumstances, particularly in the early part of this history, are too minutely detailed; whereas, in other parts, where it ought to be more minute and specific, it is too much compressed. It is highly desirable undoubtedly to compress pleas of this nature as far as may be consistent with a perspicuous exposition of the leading facts of the case: the more distant parts of the statement, which cannot bear strongly on the point at issue, ought not to be too diffusely spread out; and where the object is to deduce a continuance of intention it is obvious that the latter part of the period becomes the most important; and it is there where we should expect to find the most stringent facts.

Another objection to the formal part is the enumeration of all the next of kin by name at the conclusion of every article; and this occupies nine or ten lines in each of them. It has been a very convenient rule of modern practice to omit the repetition of this recital; and it is most extremely desirable, that every thing should be omitted, which, in however trifling a degree, may tend to increase the expense of the parties contesting the suit.

If, however, the objections were merely technical, or confined to the circumstance of the plea being too diffuse or too much compressed, the Court would refer it back to the proctor, to be amended and altered under the advice of his counsel.

To proceed, therefore, to the substance of the allegation: since it is clear that no advantage can result to the parties from the admission of it, unless there is a prospect that it will establish their case.

Where an unfinished draft is propounded, it must be shown that the deceased was prevented, by invincible necessity, or by the act of God, from completing it. A person certainly may, in the last moments of his life, so recognize a testamentary paper written twenty years before, as to give it effect and validity, without any formal execution:

(a) See page 30.

the length of time during which it had continued unfinished would not of itself be sufficient to induce the rejection of such a paper, although it would create a circumstance of strong presumption against it.

[The Court then commented at considerable length upon the several circumstances which had been alleged in the plea, and concluded with the following observations:—]

Upon the whole, considering that there are two papers executed and attested in May; that they contain no disposition of the residue; that the draft in question was prepared four months anterior to the death of the deceased; that he had abundant opportunity to execute it; that subsequent to its being thus prepared, viz. on the 3d of September, he executed a will for the disposal of real estates; and that during his last illness he made no express reference to this draft: I think the allegation does not set up a case which is likely to succeed; indeed, if all the facts laid in it should be proved, I see no prospect that No. 5. could be established.

I shall not, however, proceed absolutely to dispose of this allegation; but shall allow the parties an opportunity of amending and supplying the deficiencies of it. Feeling, however, it my duty to adhere firmly to the principles I have laid down, if the deficiencies I have pointed out cannot be(b) supplied, I shall decidedly reject the plea.

(b) In consequence of this permission a second allegation was tendered to the Court, on behalf of the executors, named in No. 5, which, after undergoing considerable discussion, was rejected as inadmissible.

MAIDMAN v. ALL PERSONS IN GENERAL.—p. 51.

Sir JOHN NICHOLL. (*Dictum.*)

In point of practice, it is not uncommon upon a decree issuing to show cause why administration should be committed to A. B. a creditor, to substitute C. D. another creditor, on the day assigned for the appearance of the parties interested, and to suffer administration to pass to C. D. though not the person in whose name the decree originally went.

H. 284.

GREEN v. SKIPWORTH and Others.—p. 53.

An allegation propounding a will made by interrogatories, admitted to proof.

THOMAS GREEN, of Little Thurroch, in the county of Essex, died on the 11th of December, 1808, leaving personal property to the amount of nearly 8000*l*. His widow prayed probate of the following testamentary schedule written in pencil:—

“I *shall* leave Mrs. Green all the *stock, effects*, and improvements, and as to any thing else, I shall *speak* to you again, Sir.”

“George Kavanagh,
“John Mills Evans.”

“Do you wish now to give any further directions as to farms or otherwise?”

“Not at present.”

“George Kavanagh,
“John Mills Evans.”

“*Quere*—At the instance of Mrs. G. and Mr. Wilson.”

“In case of any thing happening to you, who do you wish to have the farms—the Skipworths, Mr. Wilson, or who?”

“*Answer*—Mrs. Green.”

“George Kavanagh,

“George Dandridge,

“John Mills Evans.”

The allegation in which the schedule was propounded pleaded:—

“That the deceased having been taken suddenly ill, on the 10th of December last, sent a message by Mr. Dandridge, a neighbour, to Mr. Evans, an attorney, desiring his immediate attendance to make his will.

“That Evans, immediately on receiving the message, went to the deceased, and found him extremely ill; and, although of perfect mind, scarcely able, from bodily pain, to hold much conversation; that the deceased himself first addressed Evans, by observing, that he found himself scarcely able to talk to him; whereupon Evans requested him not to hurry himself, and sat down on the side of his bed; and, after a short interval, observing the deceased again preparing to speak to him, said, that it might save him unnecessary exertion, and probably be the best means of carrying his purpose into effect if he would allow him to ask him a question or two, to which the deceased signified his assent; that Mr. Kavanagh the apothecary who attended the deceased, was in his room, and Evans in his presence proceeded by asking the deceased whether it was his wish to give any instructions for his will? to which the deceased immediately replied, ‘*I shall leave Mrs. Green all the stock, effects, and improvements; but as to any thing else, I will speak to you again, Sir.*’ Whereupon Evans wrote down such his reply with a black-lead pencil; and the same having been read over to the deceased, he signified his approbation thereof, and Evans and Kavanagh subscribed their names in pencil; and Mr. Wilson a relation, being in the house, was called up into the room, and the clause was again read over to the deceased, and he was asked by Evans if that was what he wished, to which he distinctly answered, ‘*Yes.*’ That he was then also asked if he wished to give any farther instructions as to farms, or otherwise; but, appearing to suffer an increase of pain and bodily illness, he replied, ‘*Not at present.*’ That this question and reply were written down by Evans, and attested by him and Kavanagh.

“That the several persons then left the room, and shortly after the deceased’s wife came into the parlour to them, and requested them to return into the deceased’s room, as he had expressed a desire to give further directions. Accordingly they went back, and found the deceased somewhat revived, but still in great pain; and Mr. Dandridge who was in the house was also called up; that Evans having noticed how the deceased had appeared to suffer from his efforts to speak, observed that every means should be used to save him as much as possible from such exertion; and, therefore, if it was approved of, he would ask the deceased any one or more questions they might wish, and would endeavour to put the same to him in as few words as possible; which proposal was assented to by all persons present, and also by the deceased himself; that thereupon the following question was put, being first written down with a black lead pencil, by Evans, ‘*In case of any thing happening to you, who do you wish to have your farms? the Skipworths, Mr. Wilson, or who?*’ to which he replied, ‘*Mrs. Green.*’

and the question being again read over to him, he repeated the same answer; that Mrs. Green being requested to withdraw, the question was again put to him in her absence, and he again replied in the same manner; whereupon Evans wrote down the reply, and together with Kavanagh and Dandridge subscribed it.

“That immediately after the premises the deceased’s bodily pain much increased, although he still retained the right use of his mental faculties; but shortly afterwards he became wholly worn out with pain, and was rendered incapable of proceeding further in the giving instructions for and executing a more formal will, and he died on the middle of the following day.”

Three nephews (the next of kin) of the deceased contested suit against the widow.

Adams and Jenner, for the nephews.

Arnold and Swabey, for the widow.

JUDGMENT.

Sir JOHN NICHOLL.

This paper is certainly very defective in point of form; but it is intelligible, and is rendered still more so when explained by the circumstances stated.

The objections taken are first, that on the face of it, it is not testamentary.

Secondly, that the allegation does not profess such an explanation as would entitle it to probate.

A will made by interrogatories is valid; but undoubtedly wherever a will is so made, the Court must be more upon its guard against importunity(a), more jealous of capacity, and more strict in requiring proof of spontaneity and volition than it would be in an ordinary case. But if there is clear capacity, if there is the animus testandi, and if the intention is reduced into writing, the Court must pronounce for it.

The testamentary act, in this instance, originates entirely with the deceased; it is proceeded in by question and answer, on account of the extreme difficulty he experienced in the articulation of his words, and not from any want of volition.

If the facts pleaded shall be proved, they will be sufficient to show that these answers were intended for instructions; and, in point of law, if a person gives instructions for a will, and dies before the instrument can be formally executed, the instructions will operate as fully as a will itself.

It has been observed, that the act was rather that of the persons by whom the deceased was surrounded, than of the deceased himself. But under the circumstances the precautions used were very proper; the exertions of speaking might have been fatal, and have prevented him from proceeding to express what his intentions were; the resort therefore to question and answer was highly judicious; it was the best practicable mode of collecting his wishes and intentions, as far as he was capable of expressing them, and was adopted with the concurrence of the persons present, as well as of the testator himself.

For the present, then, assuming, as I am bound to do, that this allegation(b) contains an exact representation of the facts, I am of opinion

(a) Swinburne, part ii. sec. 5.

(b) This cause came on for hearing in Michaelmas Term, viz. on the 16th of

that this paper, as far as it goes, does contain instructions for a will, and therefore if the statement shall be established by proof, the Court must comply with the prayer of the allegation, and grant probate of the paper propounded.

December, 1809, when the facts detailed in the allegation being fully substantiated by the evidence of the several persons who were present during the transaction, the Court decreed the paper propounded to be entitled to probate.

DEVEREUX v. BULLOCK and BULLOCK by his GUARDIAN.
p. 60.

Unfinished instructions not entitled to probate.

RICHARD BULLOCK, a merchant and ship-broker, of the City of London, died on the 13th of May, 1806, possessed of personal property exceeding in amount £30,000, and a small freehold estate. On the 31st of May, in the same year, the reverend John Bullock, brother of the deceased, and the only next of kin, administered to his effects, as having died intestate; he and a niece (the daughter of another deceased brother) being the only persons entitled to the distribution of his property.

The present suit was instituted in 1807, by the reverend John Devereux, who cited Mr. Bullock to show cause why the letters of administration granted to him should not be revoked; and asserted himself to be a legatee in the following will or testamentary schedule:—

“This is the last will and testament of me, Richard Bullock, of Cushion Court, Broad Street, London, merchant. I give and bequeath to the reverend John Douglas, of Castle Street, Holborn, in the City of London, two thousand pounds bank stock. I give and bequeath to my brother, John Bullock, for and during his natural life, one annuity or clear yearly sum of two hundred pounds, to be issuing and payable out of, and charged, and chargeable upon the long annuities standing in my name in the books of the Governor and Company of the Bank of England, and to be paid and payable to him when, and as the said long annuities shall become due and payable; and from and after the decease of my said brother, I give and bequeath the said annuity of two hundred pounds unto the said John Douglas, his executors, administrators, and assigns, absolutely for ever. I give and devise unto my servant Sarah Robinson, and my god-son Richard Lynott, all those my two freehold messuages or tenements with the appurtenances, situate and being in Cushion-court aforesaid; to hold to them for and during their natural lives, and the life of the survivor of them; and from and after the decease of the survivor of them, I give and devise my said two messuages or tenements, with the appurtenances, unto the said John Douglas, his heirs and assigns for ever. I give and bequeath unto the reverend John Devereux, of White Street, Moorfields, London, all my interest in the lead mines company, or society, held in Martin’s Lane, Cannon Street.”

It appeared that the deceased had duly executed two wills; one on the 18th, the other on the 21st of November, 1799; the latter of which continued in existence till within a few weeks of his death; these in-

struments were both before the Court in a cancelled state; the contents of them were nearly similar.

The evidence adduced to give testamentary effect and validity to the paper now propounded was as follows:—

Mr. ANDREW LEE deposed,

“ That about the end of March or beginning of April 1806, Mr. Michael Collins, his clerk, being then about to live in the service of Richard Bullock, was, in consequence thereof, several times with the deceased; and on one day, happening about that time, the deceased sent his will, dated the 21st day of November, 1799, to the deponent, opened and cancelled, by the signature of his name being struck through; and the same was so brought by Michael Collins, together with a verbal message to draw or prepare a new will for him; that being then confined by the gout, and unable to go out, he sent a message back to inform him thereof, and that it was impossible for him to make a new will without proper or further instructions; and having afterwards, during the time he was so confined by severe indisposition, received many pressing messages to attend the deceased and make his will, he, as soon as he found himself able to go out in a coach, sent a verbal message to the deceased to inform him that he would wait upon him on that day, which was the 5th of May, 1806, if agreeable to the deceased; and the answer he received to such message was delivered to him verbally by Michael Collins, informing him that Mr. Bullock had been so fatigued by persons calling to see him on that day, that he had then composed himself to rest, and would be glad to see the deponent on the next day; and accordingly on the next day, being the 6th of May, 1806, he went in a coach to the deceased, and was conducted into the bed-room, where he lay confined to his bed by illness; and he then sat down and conversed with the deceased on several subjects, for some little time; and the deceased not having in any manner alluded to his desire of having a new will made, and the deponent being rather surprised thereat, as he considered the several messages he had received to attend the said deceased and make a new will for him, came from him, took occasion to mention the subject himself, by asking if he did not wish to have a new will made? to which the deceased answered, he did; and having then given the deponent some instructions verbally, as to the alterations he wished to have made in the disposition of his property; and the deponent having then brought with him the cancelled will, dated the 21st day of November, 1799, immediately proceeded to draw or prepare a new will from the verbal instructions which the deceased then gave him, in respect to such alterations he wished to have made in the disposition of his property by such aforesaid cancelled will, and the deceased having directed that an annuity of 50*l.* should be given to his servant, Sarah Robinson, for and during her natural life, and he having accordingly inserted such bequest in the will he was so preparing, and finding immediately afterwards, from the deceased's own instructions that the said annuity was to be made chargeable on his two freehold messuages or tenements, in Cushion Court; and that a like annuity, chargeable on the same premises, was to be given to the deceased's godson, Richard Lynott; and also that the said two freehold messuages were to be devised to them, the said Sarah Robinson and Richard Lynott for their natural lives, and the life of the survivor of them, he, the deponent, thereupon of his own accord, and without any directions from the deceased, struck out the legacy or be-

quest of 50*l.* a year to the said Sarah Robinson, because the said two intended annuities were, as aforesaid, to be charged on the said two freehold messuages, so as aforesaid intended to be devised to them the said Sarah Robinson and Richard Lynott, and then proceeded in preparing the will from the verbal instructions of the deceased; and having then come down to a legacy or bequest of the interest in the lead mines company or society, held in Martin's Lane, Cannon Street, London, which the deceased directed to be given to the Rev. John Devereux, and the same having accordingly been inserted in such intended will, he directed that Mr. James Williamson and Richard Lynott should be appointed his executors; but not having disposed of the residue of his personal estate, or given any directions respecting the same, the deponent asked him if it was his intention to leave the same to his executors, or that they should take it; and on the deceased answering no, the deponent told him, that he must leave some kind of legacy to the said Mr. Williamson, otherwise he would take the residue of his personal estate as it was not disposed of; and the deceased, after some consideration, not having made up his mind as to what legacy should be given, to the said Mr. Williamson, or whether he would give any further or other legacies by his intended will, told the deponent to take the papers away with him, meaning the new will, and a copy of the deceased's late brother's will, which he had made Mary Robinson, the daughter of his servant, find for him in the early part of this transaction; and he saith, that to the very best of his recollection he thinks, (but cannot depose thereto with certainty,) that when he had finished writing the will, so far as the deceased gave him instructions, he read the same all over to him, but not for the purpose of obtaining his approbation thereof, not thinking it of any consequence till the will should be completed; but he is certain that the deceased well knew and understood the contents thereof, as he dictated the same, and more especially if the deponent read the same to him, which he really thinks he did, for he, the said deceased, was, during all the time hereinbefore deposed of, of sound, perfect, and disposing mind, memory, and understanding; and capable of doing any thing requiring thought, judgment and reflection. That when he took the will away with him as directed by the deceased on the 6th of May, the deceased, though evidently desirous of a little time to consider what legacy he should leave to the aforesaid Mr. Williamson, and how he should dispose of the residue of his personal estate, did not, as the deponent recollects, desire him to call again in a few days, or in a short time, that his will might be completed, or to that effect; for if he had, the deponent would have called on him the very next day for that purpose, whereas he waited, expecting to be sent for, till Saturday the 10th of May; that he never received any message from the deceased on the subject of his will, or to attend him from the 6th till the 10th of May, for if he had, he should certainly have gone on either of the intervening days, that is to say, on the 7th, 8th, or 9th of that month, for, though he continued weak in his feet, he was not confined to the house, but could go out in a coach. That on the 10th of May he did receive a verbal message as from the deceased (but did not see the messenger,) saying, that Mr. Bullock wished the deponent to come to him to finish his will, and that his brother was with him, and wished him to come; and accordingly he took a coach and went to the deceased's house, where he saw the Rev. John Bullock, of whom he enquired if his brother was in a competent

state to make a will, to which Mr. Bullock answered he was, and the deponent then went up stairs into the deceased's bed-room, where he lay confined to his bed by the illness of which he died; he sat down by the deceased's bed-side, and either Mr. Bullock, or Sarah Robinson the deceased's housekeeper, told the deceased that Mr. Lee was come, upon which, as he lay in bed, he turned his head and looked at the deponent, and then the deponent introduced the subject of his will by asking him if he would choose to leave his niece any thing, or to that effect, but the deceased made no answer but turned his head away again, and did not utter a word during the whole time the deponent remained with him; upon which the deponent, imagining that the deceased did not choose to do any thing further respecting his will at that time, left the room and came away, but he did not imagine that the deceased was at such time incapable of proceeding with his will, as he did not know that he, the deceased, was in the exhausted state of body and mind pleaded and set forth in the fifth article of the allegation, for the deponent did not remain with him so long as a quarter of an hour at the time articulate, and never afterwards saw him; and he says the testator did give, will, dispose, bequeath, and do in all respects as in the said paper-writing marked A. is contained, but he cannot take upon himself to swear that the deceased never departed from his intentions therein expressed, or that the said deceased would have executed the said paper-writing as his last will and testament had the same been completed even on the next day, because he was a person very changeable, but if it had been completed at the time the deponent wrote the said paper-writing, he does not doubt that the deceased would then have executed it."

SARAH ROBINSON deposed,

"That some time in February, 1806, the testator was taken ill of the illness of which he died, and was confined to his room, and very much and almost chiefly to his bed, from that time till his death, though he was occasionally dressed and sat up a little in his room. That one day happening about a fortnight or three weeks before Easter day next before his death, the deceased gave her a key of a box which stood in his room, in which he kept his papers of consequence, and told her to give him thereout a certain paper, which he described to her; and when she had so done, he told her that it was his will, and desired her to take notice of what he was then going to do, and then he run a pen with ink through his name subscribed thereto, and said, there, take notice that I have run my pen through my name, and this will is now no more. I shall make a new will when Mr. Lee can come. And after he had so cancelled his will, he several times sent, (and among others sent the deponent and her daughter) to Mr. Lee's house to enquire how he was, and the answer that was always brought back was that he was extremely ill, and unable to get out, or to that effect. That on Easter Sunday he complained to the deponent of having found a great alteration in himself for the worse, and expressed a great anxiety for Mr. Lee to come to make his will, and said that he intended to leave the deponent fifty pounds a year, and asked her if she thought that enough, to which she answered, it was; and he said if she thought it was not enough she should have more; and he further said, he thought that he should leave his godson, young Lynott, one of the houses in Cushion Court, and that he would leave something to the bishop, meaning the Roman Catholic bishop, the Rev. John Douglas, for the Blind Charity in St. George's Fields;

and about six o'clock in the evening of Easter Sunday he sent the deponent to Mr. Lee's to enquire how he was, and whether he was able to come out; but the answer was, that Mr. Lee was so bad he was unable to come out or to help himself to any thing; and again, very late in the said evening, and also in the evening following, the deceased sent the Rev. John Devereux to enquire how Mr. Lee was, and whether he was able to come to him; but Mr. Lee continued confined by indisposition for some weeks, and was not able to come to the deceased till within a week or ten days before his death, about which time Mr. Lee came in a coach, and was from thence assisted up stairs to the deceased's bed-room; that, after Mr. Lee had left him, the deceased told the deponent that he had talked to Mr. Lee so long, and was so exhausted, that he could not talk to him any longer, and that Mr. Lee was to come to him the next day, but that he had taken care of the deponent, or he expressed himself that effect. That the deceased expecting Mr. Lee daily to come and finish his will for him, expressed great anxiety at finding he did not come, and a messenger was sent every day, after the said day when Mr. Lee came as aforesaid and began to make the said will for the deceased, to know how Mr. Lee was, or information thereof was daily brought to the deceased's house by the clerk or servant of the said Mr. Lee, who used to call to inquire how he was. That, on the Thursday or Friday next before the day on which the deceased died, (which happened on a Tuesday, he having become extremely weak and low, and evidently near his dissolution,) the deponent took occasion to mention to the Rev. John Bullock that he had not signed his will, and the Rev. John Bullock thereupon recommended that Mr. Lee should be sent to, and the deponent thereupon sent her daughter for that purpose, who brought back an answer that Mr. Lee was too ill to come out, and Mr. Lee did not come till Saturday, the 10th of May, and he was then shown into the deceased's bed-room, but he was then so exhausted and weak, that, though he was spoken to, and understood what was said, he was unable scarcely to give any answer, and it was therefore judged improper to proceed with his will, and he continued in that state all that day, and on the next he became speechless, and so continued till he died on the thirteenth of the said month of May, (being Tuesday) without having had sufficient capacity of mind to complete his aforesaid will."

MARY ANN ROBINSON, (the daughter of the preceding witness,) deposed,

"That about noon on Thursday the 8th of May, her mother told her to go to Mr. Lee's house and to inform him that the Rev. Mr. Bullock wished him to come to the deceased's house immediately if he was able to come out, but did not say for what purpose he was wanted; accordingly she delivered this message to Mrs. Lee, who returned for answer that Mr. Lee was very ill and unable to come out.

"This witness spoke also to Mr. Lee's coming on the 10th, and remaining a very short time in the bed-chamber of the deceased, and added, that the deceased was during that day in a very weak and exhausted state, notwithstanding which he did in the course of the day speak to the deponent about some money he wished her to carry to the bankers, which she accordingly did."

JOHN LYNOTT deposed,

To the deceased's having sent to him during his last illness to ask him to be one of his executors, and to his telling him that he had given instructions for the making of his will, and that he intended to invest

a sum of money in the name of the trustees for the use of the Roman Catholic College.

DOROTHY LYNOTT, (wife of the preceding witness,) deposed,

To the deceased's expressing to her his wish that her husband should be one of his executors, to his telling her that he had taken care of her little boy, to whom he was godfather, and to the great anxiety the deceased testified for several days preceding his death to see Mr. Lee for the purpose of finishing his will.

Swabey and Adams for the next of kin.

Arnold and Daubeny contra.

JUDGMENT.

SIR JOHN NICHOLL.

The question is whether this paper can be established upon this evidence? it contains mere instructions; it is not complete even as a paper of instructions, for they are only a part of the intended disposition. Such a paper, however, might be established by circumstances; but for this two points are absolutely necessary. First, the Court must be completely satisfied that the deceased had finally decided to give these legacies. Secondly, that he never abandoned that intention, but was only prevented by the act of God from proceeding to the completion of his will.

If the instructions had been completed, and the drawer only dismissed to prepare a more regular will from them, that would be an act preparatory to execution and a confirmation of his intentions, and consequently would stand on stronger grounds than this case, where the instructions have only been proceeded in in part, and the drawer is to return for the purpose of receiving further instructions; for here the whole matter lies open to the re-consideration and revision of the deceased. The perusal of the former part, and the consideration of other bequests, might naturally enough induce a change in the legacies. Unless therefore there was the strongest possible evidence that the intention of the deceased, as far as it went, was fixed, the Court would not grant probate of a paper of this description. Again, when the deceased stops in the middle, it is a presumption that he did not intend to proceed to execution; for it is never to be forgotten that the strong presumption of law is against a paper of this nature, and the onus probandi lies on those who set it up to show, on the one hand, the full and entire determination of mind on the part of the deceased, and, on the other, the inevitable incapacity which prevented him from executing it.

Does the evidence in the present case satisfy these demands? Mr. Lee, the drawer of the instructions, was the confidential attorney of the deceased; his impressions therefore will have great weight in forming the opinion of the Court; according to his testimony, the anxiety of the deceased was not strong, his heart was not in the transaction; when Lee went to him on the 6th of May, the deceased commenced a conversation on other subjects, and made no allusion to his will till Mr. Lee directed his attention to that topic.

The two Robinsons and the two Lynotts indeed say that the deceased expressed great anxiety for the arrival of Lee; but it is to be observed that these witnesses are disappointed persons, to whom the deceased had always held out hopes of legacies; their evidence therefore is to be received with caution; though there is no imputation against them that they speak corruptly, yet they naturally speak under a bias. Mr. Lee

is not certain as to reading over the paper to him, he only thinks he did; he says the deceased hesitated as to the disposition of his residue, as to a bequest to his executor, and also as to whether he should give any further legacies. The conclusion of the instructions was postponed, not because he was exhausted, but because he had not fully made up his mind. This happened on the 6th of May; Mr. Lee received no message again till the 10th, or he should have repeated his visit; and during the interval the deceased was perfectly in a state to have proceeded with his will.

The two Robinsons and two Lynotts say that the deceased was exceedingly anxious to complete his will, that repeated messages were sent to Mr. Lee, but that the answer returned to them was that he was laid up with illness, and unable to come; but all this is at complete variance with the evidence of Mr. Lee himself, who says he was not ill, and that he should certainly have gone to the deceased had he received any message to that effect.

When this inconsistent evidence is produced by the party setting up the paper, on what has the Court to rely? Upon the fact undoubtedly that for four days, though the deceased continued perfectly capable, no further progress was made in this will. On the 10th Mr. Lee received a message as from the deceased, and going to him was informed by his brother, in reply to a question he put to him, that the deceased was sufficiently in a state of capacity to proceed; this is material to show capacity, as the brother could have no motive for representing him to be in a better state than he really was, for his interests would most probably have been affected by any will. The deceased is not insensible, he attended to the information given him of Mr. Lee's coming, he turns round and looks at him but says nothing; when Mr. Lee questions him about his will he is not unmindful of it, but he turns away his head, which Mr. Lee attributes not to incapacity but to dislike to proceed.

The other witnesses attempt to account for this behaviour by representing him to be in an exhausted state; but, nevertheless, one of them mentions a fact which shows that he was capable of an act of business, namely, that on that day he had given her money to carry to his bankers.

Here then is not only an omission, but a direct refusal to complete this paper; how is it possible for the Court to support it? how can the Court say that thus far at all events the deceased had decided to dispose of his property? Further, if these legacies were supported by the uniform dispositions of former wills, some weight might be attributed to this circumstance; but it is not so, not one of the bequests is precisely the same in the former wills; they are not supported even by the more recent declaration deposed to by Sarah Robinson, giving her full and entire credit for the accuracy of these declarations.

The character of the deceased has been adverted to; and, if he had been a person uniform, steady, and invariable, in his habits, some reliance might have been placed on this; but the reverse appears to have been the fact, without relying on the declaration spoken to by Sarah Robinson that the deceased was such a shuttle-cock that he promised her one moment what he would not do another, it appears from the more satisfactory evidence of Mr. Lee that he was a person of a very changeable mind. How then can the Court say that he had not departed

from his intention; but that his fixed mind and will went along with this paper? In the very course of giving these instructions there are important fluctuations of intention.

From such circumstances the Court could hardly establish any paper which had not received formal execution, without great danger of injuring the rights of the next of kin, to whom, it must be remembered, the law gives the property if there is no testamentary disposition.

In this case, where there are only a few first instructions, and they are not conformable to any former dispositions, nor precisely supported by any recent declarations, where they receive no partial approbation and confirmation as far as they go, the deceased stopping from not having made up his mind as to the rest of his will, making no further appointment with the drawer, and living five days without any further act, and when the drawer did attend him afterwards declining to proceed, the Court can have no difficulty in deciding against this paper, and in decreeing the administration to the Brother and next of kin of the deceased.

[The sentence in this case was affirmed on appeal to the High Court of Delegates, May, 21, 1810.]

BEAUMONT v. PERKINS.—p. 78.

An article of an allegation pleading comparison of hand-writing by persons who had seen the deceased write, and also by persons skilled in hand-writing who had not seen him write, admitted.

ANN PERKINS was the testatrix; her will bore date December 9, 1807, and was opposed by Charles Beaumont an executor under a former will; an allegation was given in by him consisting of fourteen articles, the last of which only was objected to. It pleaded,

“That the name, Ann Perkins, subscribed to the pretended last will and testament of Mrs. Perkins, the party deceased, dated 9th of December 1807, is not the hand-writing of the said Ann Perkins, and it is well known or believed not to be of her hand-writing by divers persons of good credit and reputation, who have frequently seen her write and subscribe her name, and are thereby become well acquainted with her manner and character of hand-writing and subscription, and that by a comparison of the said names Ann Perkins subscribed to the pretended last will and testament of the deceased with the names Ann Perkins set and subscribed by the said Ann Perkins to the wills respectively bearing date the 24th of May 1802, 28th of October 1805, and the 15th of November 1806, and also with the letter written by the deceased as pleaded in the 5th and 6th articles of this allegation, and with the letter of attorney pleaded in the 10th article of this allegation; it evidently appears to persons judges of hand-writing and fully competent to form an opinion thereof, that the said names Ann Perkins set and subscribed to the aforesaid pleaded last will and testament are not of the hand-writing of the same person who so subscribed the said wills of the deceased bearing date as aforesaid and mentioned in this allegation and wrote the said letter and subscribed the letter of attorney as herein-mentioned.”

Arnold and Edwards, against the admission of this article, referred to *Reilly v. Rivett* (a).

Adams and Jenner contra.

JUDGMENT.

SIR JOHN NICHOLL.

I do not understand that any objection has been taken to the first part of this article; but only to that part of it which pleads that, on a comparison of the subscription to this will with the deceased's subscription to other wills and to a power of attorney, it appears to judges of hand-writing not to be the subscription of the same person: and this is introduced for the purpose of laying before the Court the opinion of persons skilled in comparison of hand-writing.

The question is not what the effect of this evidence may be, but whether it is admissible? It is not denied that such evidence has been admitted; indeed no case has been suggested on which it has ever been rejected; the Court is not at liberty to refuse it from any present opinion it may entertain of the little effect it may ultimately produce; one sees no ground for rejecting absolutely evidence of this sort. It has been truly said that all evidence of hand-writing is evidence of opinion; if a person has seen another write twenty years ago, he can only form his belief as to his writing by a comparison with what he once saw: what is this but evidence of opinion? it is not suggested that the comparison should not be made, but it is said the Court may make it; the Court, however, may not feel itself competent to the task; to this it is replied that then it may refer the matter to registrars as was done in the case of *Heath v. Watts* (b); but, what is this but evidence of comparison and opinion?

(a) *Reilly v. Rivett*, *Prerog.* 28th July, 1792.

In the 10th article of an allegation, it was pleaded, "that a paper of instructions exhibited in the cause was, in the opinion of persons skilled in hand-writing, written in a studied and fabricated hand, and not in the natural hand of any person, &c. and also that it appeared to be written by the same person who had written the memorandum at the bottom of the paper."

This was objected to, as extending the doctrine of comparison of hand-writing farther than it had yet been carried, viz. to produce evidence to show that it could not be the hand-writing of any person whatever.

JUDGMENT.

SIR WILLIAM WYNNE.

I do not think so; I conceive it possible for persons conversant in hand-writing to distinguish a studied from a real hand, and to give a satisfactory opinion on such a point. Comparison of hand has always been admitted in the Ecclesiastical Courts in different ways; the old way was to refer it to the officers of the Court; in *White v. Terry and Longmore*, before Sir George Hay, in 1774, the Court referred to the deputy registrars of the Admiralty and the Consistory of London for their opinion as to hand-writing.

It is observable also that it has been admitted in this very cause in the Court of King's Bench; but this Court does not want such a precedent.

The article was admitted.

(b) *Heath v. Watts*, *Prerog.* June 27, 1798.

Five witnesses were examined to hand-writing; two (and one of these a clerk at the Bank,) deposed that they believed the signature of the will was not in the hand-writing of the deceased, one believed it to be his hand-writing, and two could form no opinion on the subject.

The Court directed the deputy registrars of the Admiralty, the Arches, and of the Prerogative Courts, to inspect several signatures of the deceased, and also two exhibits of considerable length in his hand-writing which had been produced in the cause, and to compare them with the signature to the will, and to repor

In other Courts resort is often had to the evidence of persons skilled in any particular art; I see no ground for rejecting this; in general there is better evidence than that of handwriting on which the Court can form its opinion; but it may be adminicular to that evidence.

The instruments by which the comparison is to be made must be very strictly proved.

The article was admitted.

their opinion after such comparison; which they accordingly did, and reported that they had examined very many signatures (viz. 45) of the deceased in the books of the Bank, and were of opinion that neither those signatures nor the two exhibits before the Court were written by the same person who had signed the will.

In the goods of CHARLES JAMES NAPIER, Esq. heretofore supposed to be dead.—p. 83.

In the month of February last probate of the last will and testament of Charles James Napier, Esq. was granted to Richard Napier, Esq. as the brother and sole executor named in the said will, Richard Napier having first made an affidavit in which he deposed that he had received intelligence, which he believed to be correct, that the said Charles James Napier had been (a) killed in an engagement with his majesty's enemies at Corunna in Spain, on the 16th of January last.

On this day, Bogg, proctor for Richard Napier, on the behalf of his party, voluntarily brought in and left in the registry of the Court the said probate; and the Judge, on the motion of counsel, by an interlocutory decree, revoked the probate so as aforesaid granted in error, and declared the same to be null and void to all intents and purposes whatsoever in the law. At the same time Charles James Napier appeared personally; and the judge, at his petition, decreed the original will together with the probate, being first cancelled, to be delivered out of the registry to him or the said Bogg for his use.

(a) He was left for dead on the field of battle; and reported in the dispatches of Sir John Hope to be amongst the number of the slain.

See London Gazette, Jan. 24, 1809.

WHITE v. DRIVER.—p. 84.

Ex. R. 1667.

A lucid interval established.

ELIZABETH MANNING died on the 26th of January, 1805, at the house of Mr. Driver, at Chadwell, in Essex; the only relations who survived her were two sisters and a nephew and niece, the children of a deceased brother: her will bore date the day immediately preceding her death; her property was bequeathed in thirds, one third to the nephew, another to the niece, and the remaining third to their mother the widow of her brother, who since his death had intermarried with Mr. Driver. The will purported to be signed and executed in the presence of three witnesses.

The two sisters impeached the validity of this instrument on the ground of the insanity of the testatrix.

Many witnesses were examined who deposed to the childish and extravagant conduct of the deceased at several periods of her life. In 1801, she had been found in the parish of St. John's, Hackney, and taken to the workhouse there, where she had been confined several weeks and treated as an insane person. It was in evidence also that in Dec. 1804, the persons who resided in the immediate neighbourhood of Peacock Street, Kennington Road, where she and a sister (who was in the same weak and insane state as the testatrix,) then lived, considering themselves and their property in danger of fire from the incapacity and childishness of these two women, lodged a complaint against them to the parish officers, who on the 17th of November conveyed them both to the workhouse at Newington.

MARY CROSSLAND *deposed,*

"That during the time the party deceased remained under her care, viz. *from the 17th of December, 1804, to the 21st of January, 1805,* she was constantly treated by her and her assistants as an insane or mad person, that she behaved with so much violence as to render it necessary for a straight waistcoat to be put upon her." This witness also expressed her belief, "that, from the weak and childish state of the deceased, she was not on the 21st of January 1805 capable of knowing with whom or where she was going, and that she was wholly incapable of understanding any question that might be put to her by any person whatsoever."

On the other side.

LEONARD LAZENBY, *a clerk in the Bank, deposed,*

"That on the 21st of January, 1805, the deceased came to him at the Bank for some money which she had left at three different times in his hands, having said that she would come to him again respecting the laying out of the same for her; but, as he understood, she had been prevented by illness from so doing; she was accompanied by Mrs. Driver and a young woman; she looked as if she had been very ill, which she said she had been, and she told the deponent she wanted her money as she was going into Essex with her relations to try if she could get better; he gave her a draft for 40*l.* being the exact sum due to her, which was dated the 21st of January, and it was duly presented and paid; she appeared to him of perfect sound mind, otherwise he would not have paid her the money."

Mr. WILLIAMS, *the curate of Chadwell, deposed,*

"That on the 23d of January, 1805, he was sent for to administer the sacrament to the deceased, and to pray by her, that he saw her daily from that time till her death, and that he recommended to her to settle her worldly affairs and make her will."

The apothecary who attended her during her last illness, the attorney who drew the will, and the three witnesses who attested the execution of it, all deposed strongly to her capacity.

Arnold and Swabey for the executors, cited the case of *Cartwright v. Cartwright*, Deleg. 1795, post, page 47. 1793.

Jenner and Phillimore for the sisters.

JUDGMENT.

SIR JOHN NICHOLL, (after recapitulating the evidence.)

The evidence in this case sufficiently establishes that the deceased

had been at times subject to insanity for several years preceding her death, and even down to the 21st of January 1805, only four days prior to the execution of the will in question; but it does not appear that the disorder was uniform, or always attacked her with an equal degree of violence; she was at large the greater part of her life, and had the management and dominion of herself and her actions. She seems to have had violent accessions of the disorder in the years 1793 and 1794, in 1801, and again in 1804; the evidence, however, does not preclude the proof of lucid intervals, although it raises a strong presumption against sanity: for I agree with the counsel for the next of kin that, wherever previous insanity is proved, the burthen of proof is shifted, and it lies on those who set up the will to adduce satisfactory proof of sanity at the time the act was done.

It is scarcely possible indeed to be too strongly impressed with the great degree of caution necessary to be observed in examining the proof of a lucid interval; but the law recognises acts done during such an interval as valid, and the law must not be defeated by any overstrained demands of the proof of the fact.

In this case the deceased had been subject not only to eccentricities but to delusion and derangement at different periods for several years, but it was not continuous; she was not under confinement; she managed her own affairs; she earned her own livelihood; when she came out of the workhouse on the 21st of January she acted immediately, and continued to act from that moment till her death, as a sane and rational person. There is no indication of any fraud or circumvention in procuring this will, or even in suggesting it to her; a desire to make a will is not with her an insane topic; it is recommended very properly to her by the clergyman who was sent for to pray by her, and the intention of making it was first communicated by the deceased to an old acquaintance of hers of the name of Turner; the utmost possible precaution was used by Turner in carrying her wishes into effect, by securing the attendance of an attorney, two medical gentlemen, and the clergyman.

The deceased herself declares and directs the disposition of her property: the disposition itself is neither insane nor unnatural; two thirds are left to the children of a deceased brother, and the remaining third to his widow and her second husband, and these two persons are appointed her executors: her sisters, it is true, are excluded; but they were both married, and possibly had no great claims on her.

The Court has the concurrent opinion of these several persons, viz. Mr. Turner the deceased's friend, Mr. Williams the clergyman, the solicitor, the two apothecaries, and the nurse, and that too with all their suspicions awakened and their vigilant observation called forth, that the deceased was perfectly sane and rational throughout the whole period of the transaction; some of them also prove that she was equally sane and rational a day or two before, and continued so till her death on the subsequent day.

Notwithstanding, therefore, all the jealousy which the Court should feel as to the act of a person once proved to have been insane, still under this evidence it is impossible not to concur with these witnesses in opinion that the deceased was of sound mind; and, consequently, I am bound to pronounce for the validity of her will.

DAME BYZANTIA CLARKE, heretofore CARTWRIGHT, and 1793.
CARTWRIGHT v. CARTWRIGHT and Others.—p. 90.

A lucid interval established.

JUDGMENT.

Sir WILLIAM WYNNE.

The question in this cause arises upon the will of Mrs. Armyne Cartwright deceased, which has been opposed and propounded on behalf of the contending parties.

The will is on all sides admitted to be in the handwriting of the deceased; and it is in these words.

“Wigmore Street, August 14, 1775. I leave all my fortune to my nieces, the daughters of my late brother Thomas Cartwright, Esq. except £100 each to my executors, and one year's wages to my servants and mourning. I appoint Mrs. Mary Catherine Cartwright my nieces' mother, and Thomas George Skipwith, Esq. of Newbold Revel in Warwickshire, my executors, and trustees for my nieces until they come of age or marry; if any of them should die sooner their share to go to the survivors or survivor.

“ARMYNE CARTWRIGHT.”

It appears to have been inclosed and sealed up in a cover; and upon the back of the cover, is written in the handwriting of the deceased, “This is my will. A. Cartwright.” The will is written in a remarkably fair hand, and without a blot or mistake in a single word or letter. Pleas have been given in on both sides, and there is a pretty full account of the family and connections of the deceased, and her affections, and I think it clearly appears the will is as proper and natural as she could have made, and it is likewise as conformable to her affections at the time. It appears her father was twice married; the issue of the first marriage was Thomas Cartwright and herself; the issue of the second was William Cartwright and his brother and sisters, who are the other parties in this cause. It appears that the mother of the deceased (the first wife of her father,) was a lady of considerable fortune; and that he, in consequence of that fortune, made a very large settlement upon the younger children of that marriage to the amount of £20,000, which was the bulk of the deceased's fortune, she being the youngest issue of that marriage, the whole of it vested in her; and the effect of the will is to give this fortune, which the father gave to the younger children of his first marriage, to the younger children of her brother who was the heir of the estates. It seems that £200 a year interest for part of this was paid to her by the steward of those estates, and something more was upon bond from her brother. In respect to the affection she had for the several branches of the family, it appears by some persons, particularly Lord and Lady Macclesfield and another lady (Miss Heathcote) that the deceased was particularly attached to her brother and his family. The account is this, Lord Macclesfield says, “he had been bred up in habits of friendship and intimacy with her from the early part of her life;” and he says, “judging from the general tenor of her expressions and conversation, she was by no means pleased with her father's second marriage; and he never heard her express one word of affection for her mother-in-law or any of the children

by such marriage; and that on the occasion of the death of Sir Clement Cottrell Dormer, the father of her said mother-in-law, she expressed to this deponent a very great displeasure at her father's obliging her to put on mourning, and said Sir Clement was no relation of her's. That she upon all occasions expressed the greatest affection for Thomas Cartwright, Esq. her brother by the whole blood and his children, and the general tenor of her expressions and conversations were such as convinced the deponent she always had a very strong attachment to and predilection for her said brother by the whole blood and his said wife and children beyond that she had to and entertained for her said mother-in-law and brothers and sisters by the half blood." To the same effect exactly Lady Macclesfield speaks; she says, "that her conversation and conduct were such as showed and strongly impressed on the mind of the deponent a belief that she considered her brother by the whole blood as a much nearer and dearer relation than her brothers and sisters by the half blood." And they speak to what the gentlemen have called for; for it has been said the affection of the deceased and her attachment was confined first to her father and afterwards to her brother; but what these two noble persons have been speaking positively to, is the predilection there was for the children of her brother above her half brothers and sisters. It does not rest upon this; they have proved, and what to be sure is natural, her dissatisfaction at her father's second marriage, and that she was at that time a young lady grown up, displeased at that marriage. It very clearly appears however as to a personal disgust, if any there were, that it was at that time entirely got over; for I think the conduct of Mrs. Cartwright appears to have been perfectly good as could possibly be, and she seems to have gained her confidence by her attention to her during her unhappy malady, which was affectionate and proper. It is said that she had an affection for her half brothers and sisters; but I see nothing of that; I see no visits made by the brothers and sisters at the time she separated from the father's family and had an establishment of her own; it is proved that the other children did visit her, and that they dined with her, and that she treated them with a great deal of attention, and was fond of them, a thing very uncommon with her in regard to children, as it seems she was by no means partial to children; and I think it is most completely established there was a greater predilection for the children of her brother Thomas Cartwright than for her brothers and sisters by the half blood. The evidence in support of the will rests upon full proof that it is the handwriting of the deceased, which is not at all denied, and on a recognition by the deceased which I shall come to by and by. It was pointed out and urged as a sort of complaint, as if there was something artful in the mode of pleading, and as something not altogether right in the conduct of the cause, in not having examined to the factum of the will the only person capable of giving any account of the manner in which it was actually obtained; but I do not see there is any ground for that complaint; I do see, I think, from what appears from the evidence of this person, there was strong reason for the parties who propound this will not to have thought fit to examine that person; they were not called upon to do it; it is not like a subscribing witness to a will, though I have known that not done. If you have a mind to interrogate the witness, you may call upon the party to produce the witness to be examined upon interrogatories; they must produce the witnesses to submit to interrogatories

if called upon, though they are not bound to do it without; and certainly it is not a complaint for the party to make who has produced and examined this very witness, and on her examination obtained an account as to the factum. The only witness then that has given any kind of account of the writing of the will is Charity Thom, who was present at the time; there was another witness of the name of Gore, but she is dead; therefore Charity Thom is the only person who can give any account of what passed; and the account she gives is extremely material; for I cannot agree with what was said by Dr. Nicholl, that this will relies entirely upon the face of the will itself, and upon the evidence of Mrs. Cottrell, and the proof of handwriting, for its support. I think the evidence of Charity Thom goes very materially to support it; her evidence is in these words; she says to the 15th and 16th articles of the first allegation, "That whilst the said Dr. Battie visited and attended the said deceased, he desired the nurse and the deponent and her other servants to prevent her from reading or writing, as he gave it as his opinion that reading and writing might disturb and hurt her head; and in consequence thereof she the said deceased was for some time kept from the use of books, pens, ink, and paper; that, however, sometime prior to the writing the will in question in this cause, but precisely as to time the deponent cannot speak, she the said deceased grew very importunate for the use of pen ink and paper, and frequently asked for it in a very clamorous manner; that Dr. Battie endeavoured to dissuade and pacify her, and told her that whatever she wrote he must appear as a witness against, but that if she would wait till she got well he would be a witness for her; that the said deceased continuing importunate in her desire to have pen ink and paper, the said Dr. Battie in order to quiet and gratify her consented that she should have them, telling the deponent and Elizabeth Gore the nurse that it did not signify what she might write as she was not fit to make any proper use of pen ink and paper; that as soon as Dr. Battie had given his permission that she should have pen ink and paper the same were carried to her, and her hands which had been for some time before kept constantly tied were let loose, and she the said deceased sat down at her bureau and desired this deponent and the nurse to leave her alone while she wrote, and they to humour her went into the adjoining room, but stood by the door thereof so as they could watch and see the said deceased as well as if they had been in the same room with her; that the said deceased at first wrote upon several pieces of paper, and got up in a wild and furious manner and tore the same and went to the fireplace and threw the pieces in the grate one after the other, and after walking up and down the room many times in a wild and disordered manner, muttering or speaking to herself, she wrote as the deponent believes the paper which is the will in question; but the deponent further saith that at the time now deposed to the said deceased had not shown any symptoms whatever of recovery from her disorder, and in the deponent's opinion she had not then sufficient capacity to be able to comprehend or recollect the state of herself, her family or her affairs, and during the time she was occupied in writing, which was upwards of an hour, she by her manner and gestures showed many signs of a disordered mind and insanity." She says to the 25th interrogatory, "that the deceased was occupied upwards of an hour, nearly two hours as well as the deponent can at this distance of time recollect, in making the will in question, that is

from the time of the pen ink and paper being given her until she left off writing; that the respondent and Elizabeth Gore the nurse went out of the room into the adjoining room, and left the said deceased alone in the room but not out of their sight; that she said she was going to write, but the respondent does not recollect whether she said she was going to make her will, but the respondent understood that she was writing a will; that when the said deceased was left in the room by herself she was so agitated and furious that the respondent was very fearful she would attempt some mischief to herself, but she did not do any; that a candle was given to the said deceased to seal what she had written, but the respondent cannot recollect what length of time the candle was by her; that the respondent and also the nurse were always cautious of trusting a candle near the said deceased, but on this occasion they did permit her to have a candle notwithstanding she showed many marks of derangement and insanity at the time, this respondent and the nurse being at hand and watching her to prevent any mischief; that the said deceased seemed very earnest in what she was about, but by no means closely settled, as whilst she was writing she frequently started up and walked up and down the room in an agitated manner; that it was not customary to untie the said deceased's hands, or to leave her alone when she desired it, at times when she was greatly agitated and disordered, although sometimes in consequence of her earnest intreaties the respondent and the nurse would untie her for a little, and on the occasion now particularly deposed to she was so untied in consequence of the permission which Dr. Battie had given her to have pen ink and paper, but she was not left alone, as the deponent and the nurse stood at the door of an adjoining room behind the said deceased, but not above two or three yards distant from the bureau where she sat to write."

The fact then, as it appears by the evidence of this witness, is, that the paper was written by the testatrix herself, no other person being present but the witness who gives the account and Elizabeth Gore who is since dead, neither of whom gave her any manner of assistance; and she tells you, that the deceased having first of all shown great eagerness and anxiety for pen ink and paper, did write this will the moment she obtained them without any assistance from any one; but it is said that the condition of the deceased at this time was such that she was utterly incapable of doing that or any other legal act, because it must be rational. They have certainly completely proved that the deceased was early afflicted with the disorder of her mind, I think about the year 1759, and she continued under the influence of that disorder pretty near two years, and after that she returned to her father's house being supposed to be perfectly recovered, and that she continued to reside there from that time to his death; that after that being in possession of her fortune she went about the year 1768 to housekeeping herself, and continued so to do as a rational person till 1774, and in the month of November in that year she went on a visit to her relation lord Macclesfield at Shirburn in Oxfordshire, and continued at his house about three weeks; that on the 26th of November she returned to London in a disordered and disturbed state; at first she was attended by a physician Dr. Fothergill, who found it was a disorder of the mind, and what he had not directed his attention or study to. It is proved that in the latter end of January or beginning of February 1775, Dr. Battie was called in, and he treated her as an insane person, and sent a nurse to take care of her in the way they always

do send nurses to patients disordered in mind. In general her habit and condition of body and her manner for several months before the date of the will was that of a person afflicted with many of the worst symptoms of that dreadful disorder, and continued so certainly after making the will, which was the 14th of August 1775. They have certainly made out that. Now what is the legal effect of such a proof as this? Certainly not wholly to incapacitate such a person, and to say a person who is proved to be in such a way was totally and necessarily incapacitated from making a legal will. I take it the rule of the law of England is the rule of the civil law as laid down in the second book of the Institutes, (a) "*furiosi autem si per id tempus fecerint testamentum quo furor eorum intermissus est, jure testati esse videntur.*" There is no kind of doubt of it, and it has been admitted that is the principle. If you can establish that the party afflicted habitually by a malady of the mind has intermissions, and if there was an intermission of the disorder at the time of the act, that being proved is sufficient, and the general habitual insanity will not affect it; but the effect of it is this, it inverts the order of proof and of presumption, for, until proof of habitual insanity is made, the presumption is that the party agent like all human creatures was rational; but where an habitual insanity in the mind of the person who does the act is established, there the party who would take advantage of the fact of an interval of reason must prove it; that is the law; so that in all these cases the question is whether, admitting habitual insanity, there was a lucid interval or not to do the act. Now I think the strongest and best proof that can arise as to a lucid interval is that which arises from the act itself; that I look upon as the thing to be first examined, and if it can be proved and established that it is a rational act rationally done the whole case is proved. What can you do more to establish the act? because, suppose you are able to show the party did that which appears to be a rational act, and it is his own act entirely, nothing is left to presumption in order to prove a lucid interval. Here is a rational act rationally done. In my apprehension, where you are able completely to establish that, the law does not require you to go further, and the citation from Swinburne does state it to be so. The manner he has laid it down is, (it is in the (b) part in which he treats of what persons may make a will) says he, the last observation is, "If a lunatic person, or one that is beside himself at some times but not continually, make his testament, and it is not known whether the same were made while he was of sound mind and memory or no, then, in case the testament be so conceived as thereby no argument of phrensy or folly can be gathered, it is to be presumed that the same was made during the time of his calm and clear intermissions, and so the testament shall be adjudged good, yea although it cannot be proved that the testator useth to have any clear and quiet intermissions at all, yet nevertheless I suppose that if the testament be wisely and orderly framed the same ought to be accepted for a lawful testament." Unquestionably there must be a complete and absolute proof the party who had so formed it did it without any assistance. If the fact be so that he has done as rational an act as can be without any assistance from another person, what there is more to be proved I don't know, unless the gentlemen could prove by any authority or law what the length of the lucid inter-

(a) Instit. lib. 2. tit. 12. sec. 2. (b) Swinburne, Part. ii, sec. 3.

val is to be, whether an hour, a day, or a month; I know no such law as that; all that is wanting is that it should be of sufficient length to do the rational act intended; I look upon it if you are able to establish the fact that the act done is perfectly proper, and that the party who is alleged to have done it was free from the disorder at the time, that is completely sufficient. What does appear to be the case from the evidence of these witnesses? As to Charity Thom, who seems to me to be the principal witness, she gives an opinion of her own, and that opinion is against the validity of the act, and she expressly says over and over that the deceased at the time this was done was not sane and was not capable of knowing what she did; that is the result of her evidence. The Court however does not depend upon the opinion of witnesses, but upon the facts to which they depose. All the facts which are deposed to (it does appear to me) are sane; the witness's opinion arising from her observations does not give any foundation at all for saying the testatrix was insane at the time of making the will; her opinion that the deceased was insane at such time was founded on bodily affections which were extraneous. What is the fact? she says that the deceased whilst employed about the act rose frequently and walked backwards and forward about the room, that she did not set down closely to the business, that she started up, and that she tore several papers and threw the pieces into the grate, then wrote others, and did not appear to her to act in such a way as a person who was calm would do. In my apprehension, it appears from this account her manner of doing it was this: she wrote several papers, and if she saw any mistake however trifling she was dissatisfied and probably vexed she did not write in such way as fairly to answer her own intention; the paper itself has no mark of irritation; a more steady performance I never saw in my life; and it seems hardly consistent that a person wild and furious and in such a degree of insanity as she is stated to be should write in such a way. It seems to me a very extraordinary thing, but whatever outward appearance there was it had no effect on the writing itself; she has wrote it without a single mistake or blot or any thing like it. What is the construction? that she was endeavouring to write her will, which she had taken a determination to do; that she made mistakes and destroyed those papers in which she had made them, that she knew how to correct them, and did correct them, and at length wrote and finished as complete a paper as any person in England could have done. Is this insanity? In my apprehension, it is not; it seems to me she was vexed at her mistakes, which I think shows that she had at that time her senses about her, and I think it appears likewise she was not then in fact in the disturbed condition she was before and after. They say they were generally forced to keep the strait-waistcoat upon her, that even then she would thrust out her arms if she could, and strive to thrust her fingers in their eyes, and in short do every thing that would do mischief. Is there any mischief in the present case when the strait-waistcoat is taken off? Nothing like it; as soon as it is taken off she says, "give me pen ink and paper;" and when it is given her she says, "leave me, for I am going to write;" and they go out of the room; she is not disturbed at their watching her, but pursues her own intention and completes the paper; she enquires the day of the month, and an almanack is given to her by one of the nurses who was watching her, and the day of the month was pointed out to her; she then called for a candle; and

they say they used to be cautious not to trust her with a candle, and were forced to hold it at a distance from her if she read the newspaper; but still in this case they give her a candle that she may use it in order to seal the paper; no harm was done of any kind, and none attempted; every thing that was done was for the purpose of completing the act; and am I to conclude she was insane, because she might have bodily affections, irritations of nerves, when every thing which was rational is done, and as collectedly and as exactly as any person of the clearest sense would have done, and of her own head entirely. The gentlemen have said all this is mere form. Is it mere form that a person so situated as she was should of her own accord write a will containing the most rational disposition of her property, leaving all her fortune to her nieces the daughters of her deceased brother who were the most natural to her, omitting her nephew who was possessed of a large fortune? It is mere form that she should appoint for her executors and trustees the mother of those nieces, and her nearest relation by the father's side, describing accurately the place where he lived, and that she should create a survivorship amongst them if any should die before twenty-one. Is this only form? It is the very essential part and substance of a will, and that will as rational a will as she or any other person could have made. Therefore, taking the fact to be that it was done of her own accord, it leaves nothing to be proved; that being established puts the matter beyond all possibility of doubt, and I think there can be no question but that she had a legal capacity; but, say they, we can hardly admit this is quite such a paper as it appears, and that it is the mere spontaneous act of the testatrix herself; they surmise, and to be sure it is as groundless a surmise in point of evidence as possible, that it was done at the suggestion of Mrs. Cottrell, but it appears that she was at that time out of town and had been so for a month before; but is the Court to suppose that without evidence, and is there any thing to support it? certainly not, and I cannot presume any such thing. If you have a mind to prove this was by the suggestion of Mrs. Cottrell, you may; if you do not, I must take it to be, what appears from the evidence, the pure and spontaneous act of the party herself, and that Mrs. Cottrell knew nothing of it till she was informed of it.

I do think the remaining part of the evidence is of no very material avail, for I am perfectly persuaded myself the will having been designed by the deceased herself, and made written and delivered in the manner it was, that would have been sufficient to have established an interval of reason if there had been no other evidence; but that is not all, for there are various instances which in my apprehension show that this unhappy lady had frequent instances of rational capacity. The first and the strongest is that conversation with Mrs. Cottrell, in October, 1775. It was a conversation that Mrs. Cottrell had with the deceased respecting her daughters, when Mrs. Cottrell observed to the deceased that a suit in Chancery had been decided against them, and uttered something of a dissatisfied expression which is not unlikely to fall from a fond mother, "That it appeared as if they were destined to lose every thing." I think it was a just and well founded observation of the King's advocate^(a) that even the fact of entering into a conversation of this kind is a proof that she at that time must be considered as being capable of holding the conversation, for otherwise she could not have done it; the manner in which

(a) Sir William Scott.

that conversation was introduced has been mentioned, namely, the misfortune that had befallen the daughters of Mrs. Cottrell; she says, “the deceased made some reply which the deponent not perfectly understanding she requested the deceased to repeat, and the said deceased then said ‘she had done all she could for the deponent’s children;’ and upon the deponent’s asking her what she had done, she repeated she had done all she could for the deponent’s children. Upon which Mrs. Cottrell said, (if that part of her testimony be true, which I have no manner of reason to disbelieve,) ‘what have you done Miss Cartwright; you have not made a will, have you?’ or words to that effect; and the said deceased replied, ‘Yes I have.’ And she called to the servant, Charity Thom, to bring the will; accordingly it was brought; and then Mrs. Cottrell says, ‘Who are the witnesses;’ and the deceased said, ‘There was no need of witnesses, for her estate was personal, and the will was all in her own handwriting,’ or words to that effect; that the deponent asked her ‘if she was sure there was no need of witnesses;’ and the deceased immediately made answer ‘Yes, I am sure of it, my estate is all personal, and the will is in my own handwriting;’ and that the deceased then delivered the will to Mrs. Cottrell; and upon her expressing some hesitation in receiving it, the testatrix desired and pressed upon her to receive the same.”

If this be true, it is impossible for any body to act in a more rational manner, with a perfect recollection of what she had done, and a perfect knowledge of what was necessary in order to make it a valid act; she knew better than Mrs. Cottrell did, and it is impossible I think to doubt whether she had a rational interval or not; whatever the length of it might be it was sufficient to enable her to hold a rational conversation, which is made more material, being coupled with the delivery of the will. Mrs. Cottrell, the lady who gives the account of this conversation, is very nearly connected indeed with the parties interested under the paper, being their mother, and feeling as every parent must feel for the interests of her children, cannot be presumed to depose but under some degree of bias, and notwithstanding her rank and situation in life it is very material for the Court to enquire how she is supported. I myself confess that I conceive her evidence to be perfectly proper in every respect; but, prejudiced as she must be supposed to be in favour of the parties interested under the will, it is extremely to be desired, and the Court does always require further evidence where it can be had from persons that have not the same prejudice. Mrs. Cottrell has mentioned expressly that Charity Thom was present at the time of this conversation, and that she was the person who was called upon by the deceased to deliver the paper. I do not observe that that particular fact of her being called upon to bring the will is interrogated to; but the other fact of the deceased having desired Mrs. Cottrell to take the will is put as an interrogatory to the witness, and in answer to that she says “she does not remember any thing of that kind passing.” A good deal of observation has passed in respect to the credit of this witness, and there is one part of her evidence which I do think so highly improbable it does seem to throw some degree of discredit upon her testimony; it is that part respecting Mrs. Elizabeth Cartwright; Mrs. Elizabeth Cartwright in answer to the 16th interrogatory says, “after her coming to town in October, 1775; but when in particular she cannot set forth; she this respondent was informed by Charity Gould the deceased’s attendant, and

her nurse Elizabeth Gore, that the said deceased had written a will, and that Dr. Battie had declared to the said deceased he would be against it, for that she was not fit to make a will." And to the 23rd interrogatory she says, "she apprehends it must have been shortly after she came to London, in October, 1775;" then putting it in the same way she says "she heard from Charity Gould or Elizabeth Gore that the deceased had made a will."

Now Charity Thom in her answer to the 26th interrogatory says, "That she may have mentioned the circumstance of the deceased having written the aforesaid paper to the interrogate Elizabeth Cartwright, but that she has not any recollection of her having so done, nor has she any knowledge by whom or at what time the said Mrs. Cartwright was informed thereof, and she cannot possibly depose whether the said circumstance did or did not come to the knowledge of the said Mrs. Cartwright or any of her branch of the family prior to the year 1777."

Now though I think it is not improbable that it may have escaped the memory of the witness whether she herself told Mrs. Cartwright, yet that she should find herself not able to depose whether this came to the knowledge of Mrs. Cartwright before 1777 is extremely odd, it being clear from Mrs. Cartwright's evidence that upon her coming to town there was so much conversation respecting the will with this witness; and yet for her to depose in this way, that she cannot possibly say whether Mrs. Cartwright knew any thing of the matter, does in my apprehension a good deal shake the credit of the witness. It is highly improbable but that she must know the fact very well.

Mrs. Cartwright then goes on, and says in answer to the 16th interrogatory, "That she also learned from the said Charity Gould or Elizabeth Gore or one of them that the said deceased had given such will to Mrs. Cottrell, but when she knows not; and she thinks according to the best of her recollection that she was also informed by the said Charity Gould or Elizabeth Gore or one of them that the said Mrs. Cottrell had said something about the said will not being witnessed, but what in particular she cannot set forth, and that she the said Mrs. Cottrell made also some allusion to the said deceased of the decree in Chancery which had gone against her children." Now this is what I was looking for, and that is a confirmation of that very material part of the evidence respecting the conversation on the 24th; for it is certain that Mrs. Elizabeth Cartwright soon after her coming to London was informed either by Gould or Gore of all the circumstances; she was informed that the will was delivered by the deceased to Mrs. Cottrell; she was informed there was a conversation, and that such conversation did pass between Mrs. Cottrell and the deceased as she has represented to have introduced the subject of the will; and this being confirmed in the very material manner I have now observed upon, I think I have no room at all to doubt of the truth of the matter. It is such a proof that on the 24th the deceased did enjoy a perfect knowledge of what was done, and what was necessary in order to establish it, that there could not be well a stronger proof of a lucid interval.

Another circumstance in this cause is the will which the deceased made early in her disorder, and I think there can be no question of her having a lucid interval at the time she sent to Mr. Welby an attorney and a man of credit to make the same; she told the attorney she wanted to make her will; she gave him instructions by word of mouth; there was

a discourse between them at the time of the attestation; it was perfectly executed, and he says he had not the least idea there could be any question at all as to her capacity to make a will at that time. The contents of that will had nothing irrational in them, because the attorney expressly says there was nothing of insanity appeared, he says he made the will and actually took his instructions while she was in bed, and that he took it home with him, and that a few days afterwards he received a letter desiring the will which she afterwards burnt; that was an insane act, but in my opinion when she made it she had a capacity to do, and actually did a sane act; for she gave instructions for the will which do not at all impeach her sanity, though she wrote a few days after a letter, which is a rational letter upon the face of it, desiring him to bring the will back; the account which is given by Jane Jones respecting the burning of the will is what conveys the opinion of the witness that she was at that time insane, for she says, "that a few days after the deceased came to London from Sherborne castle the deceased called the deponent into a room and put a paper into her hand which she desired her to burn; that the deponent went towards the fire to burn it, and the deceased took hold of her by the shoulders and held her whilst it was burning, and in a furious manner kept calling out to the deponent, There you devil, do you see it burn, you will go to the parish now you devil," or some frantic expressions of that nature, during which time Charity Gould the said deceased's attendant was present; that she did not assign any reason for causing the deponent to burn the said paper. And this deponent further saith that she believes the paper which she so burned was a will, which she understood had been made for the said deceased.

The account given by Charity Thom is I think not quite so strong and more equivocal; it is that the deceased said she should be happier.

The conversation that passed between the deceased and Mrs. Cottrell respecting this business is this, she says, "Upon the 5th of December, 1774, (which was just after she came to town,) the deceased told the respondent in general terms that she had made her will the day after she left Sherborne Castle in favour of the respondent's children, and afterwards more circumstantially on the 24th of the same month, when she told the respondent the medicines that Mr. Graham the apothecary had given her had disordered her head, for that on the Saturday she had come from Sherborne Castle she was very well in her head, and that on the Sunday, the following day, she was very sensible as Mr. Welby the lawyer could witness, as he came to her on that day by her appointment, and he knew she made her will and that she made it as she ought, as he knew she should then do; but that when she took those medicines, she sent for her will, and that she did not know why, but in a sudden flight she had jumped out of bed and had thrown the same into the fire, that she was very miserable she had done so, as she knew that it was very wrong and that she had now lost her senses and could not make any other will, or she expressed herself to that or the like effect, and the respondent is more particular as to such last mentioned conversation as she made memorandums of the same at the time." Now this has been represented as an absurd piece of evidence to show that the deceased was at that time rational and sensible, because she declared herself that she was not so, and was therefore incapable of making another will. That the deceased was then very much disordered is unquestionably true; but she was not perfectly irrational, she knew what

she had done, she remembered all the circumstances and it must be supposed the contents of the first will, and that they were something which she was desirous of carrying into execution. Mrs. Cottrell speaks positively to two dates of conversations; she mentions the beginning of December and the 24th, and besides that several other times the deceased did express her misery, and was sorry she had destroyed the will.

The fact that she was capable of doing an act that required thought and judgment is I think further established by the receipts which are exhibited, and of which a good deal has been said in this cause; they bear date, one of them 26th December 1774, one 27th October, 1775, one 15th December 1775, one 6th April, 1775, one 3d October, 1776, and one 24th December, 1776; all but one after the date of the will, and all of them are of the deceased's handwriting; there are two dated in March, 1775, which are not. It was said by Dr. Nicholl that those which were not in the deceased's handwriting were not accounted for, and he rather seemed to throw out some suspicion that those which are in the deceased's handwriting might possibly have been obtained by Mrs. Cottrell with a view to give countenance to the will itself; but it is very fairly accounted for in evidence, for when Dr. Battie attended the deceased at the beginning of January he refused her the use of pen ink and paper, therefore the two receipts that were written in March are in the handwriting of Mrs. Cartwright, not with any view of contrivance, but in order to assist the testatrix who was then kept from the use of pen ink and paper by medical direction; the first thing the testatrix did when she was permitted to have pen ink and paper was to write the will of the 14th August 1775, and from that time she wrote receipts in as regular a manner as any person living could have done, and with a great deal of recollection; she mentions who was the receiver, the date, and the estate upon which it was secured. What is recollection and knowledge of a fact if this be not?

There are three receipts exhibited, and those are said to have been thrown by about the room, and of which she knew nothing; they are produced and brought before the Court to show that she was not capable of writing receipts rationally; those receipts are all written upon the same day, namely 26th April, 1776, and in my opinion they show capacity. It appears to me they were attempts, begun and not finished, in order to write the receipt of that date, which she completed and which is before the Court. It appears then most clearly her manner of writing those receipts was the manner in which she wrote the will; she was extremely accurate in doing it, and when she had made some trivial mistake she abandoned the one she had begun and began another. The mistake in the receipt which is the nearest completed was in the last figure, she intended to write 1775 and had wrote the three first figures and began to write 6, therefore she gave up the whole and wrote a fresh one; the utmost that can be said is, that what she did was with the greatest accuracy, and perhaps more than any other person would have used, but there is nothing like an irrational word in the whole, nothing foolish or wild. Was she dictated to? certainly not by Mrs. Cartwright, because she says she never saw her write any thing but her name; therefore that they were dictated by her would be mere suggestion, and Charity Thom says she used to be writing or attempting to write by herself, and used to say she could not write and gave over;

mention is made by the witnesses of the great deal of difficulty and great persuasion they were obliged to use; and Mrs. Cartwright has said the method that was used to get her to write was PERSUASION. Is that discourse which is addressed to an insane person? It is that which may be addressed to an indolent or obstinate person, but surely not to one insane; nor is it the conduct of an insane person to do what they are desired to do; there are acts I think which plainly show the deceased had lucid intervals, that is, there were intermissions of the disorder upon which she was able to act rationally; besides this, it appears clearly she used to discourse like a rational person. There is one instance in particular, spoken to both by Mrs. Cottrell and Mrs. Cartwright; but I will mention the manner in which it is deposed to by Mrs. Cartwright: she says, about nine or ten years ago her son was offering himself as a candidate for All Souls' College Oxford, and she asked the deceased in what manner they were related to my Lord Fairfax; she says the deceased entered upon the conversation in the most rational manner, she answered her questions, and in all respects discoursed like a sensible person; she explained the descent of the family, and the respondent did think she was capable of giving a sufficiently accurate account. Is not this what requires a very accurate memory and recollection?

The other witnesses speak of the same things, but the turn they would give it is that this was a part of the insanity, but you are to observe not one of the witnesses say she ever mentioned any thing that was not true. Mr. Morris states that the deceased was extremely correct in her ideas about families and their intermarriages, and the respondent hath received information from her when talking on such subjects of circumstances which he did not know at the time and which he has afterwards found to be very correct and true, and he was surprised at the said deceased's precision on those points. Why? if she could converse for a considerable time; he says he used to be with her sometimes for half an hour or more. There is another witness (Pooley) at whose house the deceased was placed, and she gives a very strong instance of her memory, which continued with her till almost the last hour of her life; the deceased had not seen the deponent from the time she lived in her house, and then she had a little boy with her; the deponent was standing at the door talking with Charity Thom, and the deceased put her head out of the window and said, "what is become of the little boy." So in a variety of instances the deceased would and did converse rationally. They say the great height of her phrensy used to be to her servants, but when any of her relations approached she would be calm; and Mrs. Cartwright says, "she has heard her extremely loud, and when she came in she would be extremely calm." Is that the conduct of a person who has no distinction of persons? What does it prove? That there is almost no person so mad as not to have some degree of reason. If she had some degree of awe for any persons, perhaps they were those she had an entertainment from and could converse with like a rational person; if she could converse rationally that is a lucid interval; and that she so did and had lucid intervals I think is completely established. If she had particular subjects or topics in her mind, and at such times would talk rationally upon them, and when whose topics were out of her mind would fly into outrages of phrensy and extravagance, does that all show that at the former time she was deprived of rational capacity? in my opinion, not; at one time she had capacity enabling her to make

a will, at others not; at one time she was in fits of phrensy, and at another out of them.

How then stands this case as to those cases which have been cited, and as to the facts necessary to establish a lucid interval.

In the *Attorney General v. Parnther* (a). The circumstances of the case are not very accurately mentioned in the report. It differs however, as materially from this as any two cases can do. The act was the execution of a power of attorney. The subscribing witnesses said the party appeared to them to enjoy her faculties sufficient for the purpose, and they explained the nature and effect of it to her, and asked her if she did it with her free will and consent, to which she readily answered, "Yes;" and then executed it. And this is all the evidence as to her sanity. They bring an instrument ready written, tell her what it is, ask her if it meets her consent, she says, "Yes," and does it freely. Is that the present case? No. If this will had been prepared by Mrs. Cottrell, and brought to the deceased, and read to her, and she had been asked if that was her mind, and had executed it, that would have been a different case from the present. In this case the act is done and completed by the deceased herself; it is not a mere acquiescence or form of execution only; there is not the least colour of proof that it had been suggested to the deceased by any person living.

The ground for a new trial in Parnther's case was, that the jury, having been directed to enquire into the fact, they gave a general verdict that she was not a lunatic at all, directly against the evidence. And what the Lord Chancellor said is just. The persons there who witnessed the act, apprehended it was proper in itself, and scarcely watched the means with sufficient attention. Undoubtedly the rules laid down there were with a view to the facts of the case; but I do not see how a stricter proof can be given than has been in the present case.

Clarke v. Lear and *Scarwell* (b) was the case of a man who had been clearly disordered in his mind for a length of time; he goes to Little Hampton to bathe in the sea, and there he sees a young woman at the house where he boarded, of whom he had no prior knowledge, and wants to marry her, at a time when he was insane, is brought up to town in a strait-waistcoat, and there afterwards writes a paper by way of codicil, giving her a legacy. This is delusion. It is said that paper is as well written as this will; but who was it made in favour of? it was for a person whom he hardly knew, and of whom he had conceived a favourable impression at a time when he was clearly in a state of derangement, but to whom he had no cause whatever to give a benefit. In cases of this sort you are to enquire was it a rational and sensible act, and if you can make it appear that it is a rational and sensible act, then you go the whole length the law requires.

In *Coghlan v. Coghlan*. No man could be more completely proved to be insane than the deceased in this case before the will was thought of; I remember it most perfectly, he was sent to Brook House, and there he was attended by Dr. Monro, an apothecary, and a woman, and they all of them say he was a person as insane as they had ever seen; he was likewise visited by a gentleman, Mr. Winthrop, who was known to him,

(a) On a motion for a new trial. Hilary Term, 1792. See Brown's Chancery Cases, Vol. III. p. 441.

(b) March, 1791.

and with whom he entered into a rational conversation respecting his family, and exactly as he had told Mr. Winthrop he gave directions to an attorney to make his will, which was to the benefit of his family, except his grand-daughter; but she had had a fortune left her, and he had frequently declared he would leave her but £100 as she was fully provided for; the will in that case was drawn, and when it was first brought to him he was in some degree recovered; it was then read over to him, and he declined executing it at such time, but he did execute it afterwards, and it appeared to be the intent and desire of the testator, who had an interval to express himself; the attorney said he gave him instructions in a very composed manner; and upon that ground the will was pronounced for; there was no disorder at the time, though he was afflicted with a distemper of the mind to a very great degree, and the will was consistent with his intentions when of capacity.

In *Greenwood v. Greenwood*, the last verdict established the will, and I do not see any one of the cases which militates against the present.

I am of opinion in this case that the deceased by herself writing the will now before the Court hath most plainly shown she had a full and complete capacity to understand what was the state of her affairs and her relations, and to give what was proper in the way she has done. She not only formed the plan, but pursued and carried it into execution with propriety and without assistance. In my apprehension that would have been alone sufficient, but it is further affirmed by the recognition and the delivery of the will. Therefore under all these circumstances I have no doubt in pronouncing this to be the legal will of the deceased.

[This sentence was affirmed on appeal to the High Court of Delegates, Dec. 22, 1795, but the Delegates gave no costs.]

EARL of WARWICK v. GREVILLE.—p. 123.

Primogeniture gives no right to an administration.

JUDGMENT.

Sir JOHN NICHOLL.

The question in the present case arises upon the grant of an administration to the goods of the Right Hon. Charles Greville who has died intestate.

The deceased left two brothers, one sister, and a nephew the son of a deceased sister; the property must be distributed amongst the four; and there are three persons to whom administration may be granted:

The earl of Warwick, the elder brother, prays that it may be granted solely to himself, or to himself jointly with his brother Mr. Robert Greville: The younger brother Mr. Robert Greville prays that it may be granted solely to himself, and he is supported in this prayer by the nephew Mr. Churchill, who is entitled to an equal distributive share of the property: the sister Lady Frances Harpur prays first that it may be solely to her brother Robert, then solely to Lord Warwick, or jointly to him and her brother Robert, and lastly solely to herself, or jointly to herself and the elder or both brothers.

The statement is rather complicated, but the result of it is that there is a moiety of the interests concerned praying the sole administration for

Mr. Robert Greville; a quarter of the interests praying the sole administration to Lord Warwick; a quarter praying the sole administration to Lady Frances Harpur; a quarter the joint administration to the two brothers; a quarter a joint administration to the elder brother and the sister, or to both the brothers and the sister, for Lord Warwick unites in praying that it may not be jointly to himself and his sister.

The (a) statute leaves it to the ordinary to grant letters of administration to the next of kin; all here have an equal interest; all except the nephew stand in an equal degree of relationship; none have a legal preference; the selection rests with the discretion of the Court; that discretion however is not to be arbitrarily or capriciously assumed, but to be a legal discretion governed by principle and sanctioned by practice; in exercising it the Court is not to be guided by the wishes or feelings of parties, but is to look to the benefit of the estate and to that of all the persons interested in the distribution of the property. The first duty of the Court then is to place it in the hands of that person who is likely best to convert it to the advantage of those who have claims, either in paying the creditors, or in making distribution; the primary object is the interest of the property.

The claim of Lord Warwick to the sole administration rests merely on the circumstance of his being the elder brother; none of the other parties interested support that application; Lady Frances did execute a proxy praying that it might be either solely to herself or jointly or solely to her brother, but she has since retracted that, and her last proxy is that it may be solely to herself or jointly with him or to both her brothers.

Primogeniture gives no right; if things are precisely equal, if the scale is exactly poised, being the elder brother would incline the balance, but it would not weigh against the wish of the majority of interests. In the present case there are two interests out of the four praying that the sole administration may be granted to the younger brother, and against that majority the claim of primogeniture could not stand, this would give a decided preference if nothing else did to the younger brother.

But it has been said there is not a majority of interests this way inasmuch as there is an equal number of interests praying for a joint administration; this is not correctly the fact; no two parties have joined in praying for a joint administration, Lord Warwick does not pray to be joined with his sister; the other brother does not pray to be joined with Lord Warwick or the sister; it is Lady Frances only who prays to be joined either with Lord Warwick or with both the brothers.

Assuming however that Lord Warwick and his sister did unite in praying for a joint administration, the interests indeed would be even, but it would be an application for a joint opposed to an application for a sole administration. It has been correctly stated that the Court never forces a joint administration, because if the administrators were at variance it almost put an end to the administration. Further, the Court prefers *ceteris paribus* a sole to a joint administration, because it is infinitely better for the estate; administrators must join and be joined in

(a) 13 Edward I. st. 1. c. 19. (commonly called the Statute of Westminster,) made the estates of intestates liable to the payment of their just debts.

31 Edward III. st. 1. c. 11. compelled the ordinary to depute the next and most lawful friends of the deceased to administer his goods.

21 Henry VIII. c. 5. placed the law on the footing on which it now stands.

every act, which would not only be inconvenient to themselves, but what is of more consequence must be inconvenient to those who have demands on the estate either as creditors, or as entitled in distribution.

Supposing then there was in the present case an equality of interests, and that the Court had to choose between a sole and joint administration, still the sole all other circumstances being equal would be entitled to the preference; here are also considerable creditors who support the application for the administration being granted to Mr. Robert Greville. I collect that there is some doubt whether the estate may be solvent or not much more than solvent; it may be of considerable importance that the affairs should be managed in the most speedy and advantageous manner; the wishes of the creditors are not in all cases of weight, but they are entitled to consideration where the estate is considerable, the demands heavy, and the solvency in the slightest degree doubtful.

These considerations are sufficient where a moiety of the interests supported by considerable creditors join in praying the sole administration to be granted to one of the brothers to whose fitness not the slightest objection has been raised; there are other considerations which it is not necessary to enter upon except so far as to state that they tend to the same conclusion; there are reasons however for not unnecessarily discussing them. I wish however distinctly to state that the Court in feeling itself called upon in the discharge of its judicial duty to grant the administration to Mr. Robert Greville is not governed by any circumstances which reflect in the slightest degree on the honour and character of the noble earl who is the other party to this suit.

Administration decreed to Mr. Robert Greville.

SANDFORD v. VAUGHAN.(a)—p. 128.

Three papers established, as containing together a will.

THIS cause came on for hearing on the evidence adduced in support of the allegation, which had propounded papers 1, 2, 3, and 4, as containing together the will of the deceased.

Ten witnesses were examined; but the only portion of their evidence to which it is material to advert, is, that of Mr. Scott,

Who, after stating that the deceased had consulted him in April, 1808, as to the form of his will, and had requested him to write the preamble for him and the names of the legatees, leaving blanks for the sum he intended to bequeath to each, proceeded thus:—"That on the 28th of May, the deceased produced the paper writing so, as aforesaid, written by the deponent on the 14th of April, with the blanks for the legacies all supplied, and the paper itself dated and signed; and he directed him to make some alterations therein, [here the witness specified the alterations,] and having so done, he read it over to the deceased, being the paper No. 1. That Sir John Chichester immediately desired the deponent to transcribe it, on account of the alterations and interlineations, which he accordingly did,—the deceased dictating to the deponent, and transposing some of the bequests. That the legacies of two years' wages given to the servants in No. 1 were omitted in the deceased's dic-

(a) See page 28.

tation of No. 2. That finding No. 2 was to be of a more formal and secure nature than No. 1, he suggested to the deceased the propriety of appointing an executor; which he approving, named the Rev. John Sandford and the deponent. That the deponent observed that one was sufficient, and begged to decline; and that the deceased then desired him to write down Mr. John Sandford alone: he then read the paper over to the deceased, and suggested the propriety of having the same witnessed to render it more secure, and offered to witness it himself; but the deceased said, that, as he intended to give the deponent something, he could not be a witness; to which the deponent replied, that he might give him something by a subsequent paper, and then he should be a good witness. The deceased said it should be so, and then signed and sealed No. 2; and the deponent signed his name as a witness. That after such execution, the deponent discovered that in transposing the legatees' names, the legacies of two years' wages to the servants were omitted, and mentioned it to the deceased, who observed, that it was of no consequence, as they could be inserted in the will to be made, alluding to the one to be prepared by Mr. Harman."

JUDGMENT.

SIR JOHN NICHOLL.

The case has already received much discussion on two preliminary points, and is now reduced to a very narrow compass; it is unnecessary to repeat what took place in the earlier stages of the cause, further than to observe that subsequent investigation has confirmed the Court in the propriety of the conclusions it drew from the face of the papers.

Witnesses have been examined to prove, that the papers were executed by the deceased, with an intention of giving them a testamentary effect, and that he was a competent agent.

The proof is perfectly satisfactory; and there can be no doubt that Nos. 2, 3, and 4, must be pronounced for. The only question is, Whether No. 1 is to be considered as a part of the will, or to have been superseded by a subsequent paper; or, in other words, whether No. 2 was intended to be taken in addition to No. 1, or as a substitute for it?

The account given in evidence by Mr. Scott, the apothecary and confidential friend of the deceased, most fully confirms that which appeared from the papers themselves—that No. 1 is the mere draft of No. 2; that 2 was substituted for 1, and superseded it; and that the deceased had not the slightest intention of giving effect to both instruments.

It is said the servants will lose their legacies through a mistake, and so they will; but the Court cannot help this.

It is further said that I might pronounce for the clause as omitted by mistake; and the Court would go a great length to do so, as it has done in other cases, if it were owing to the mistake of a third party. But here the mistake was that of the deceased himself. He dictated; if an omission, it was his own. The paper was read over to him, he formally executed it, and it is attested. It would be a most dangerous step, and one not sanctioned by any precedent, upon parol evidence alone, to supply a clause which has been omitted; but the deceased himself was aware of it; it was pointed out to him, and he himself proposed the remedy; to insert them in a formal will. This would render it still more dangerous; he wrote subsequent papers, and executed others prepared by Mr. Harman; these omitted legacies were not supplied.

Under such circumstances the law must presume that they were in-

tentionally omitted; it can only safely look to facts and to written papers, not to parol declarations.

The principle must be applied, however the Court may think that the omission in this case was accidental in the first instance and forgetfulness in the second; there may be strong claims upon the liberality of the next of kin to pay these legacies to the servants, more especially as the residue may possibly be undisposed of, and come to them more from the inactivity and indecision of the deceased than from his real intention; but with this the Court cannot interfere judicially, not even in the way of recommendation.

Upon the whole I think No. 1 not entitled to probate, but pronounce for 2, 3, and 4, together, as containing the will of Sir John Chichester.

WILSON v. BROCKLEY.—p. 132.

An allegation pleading the nullity of a marriage admitted to proof.

TREVELYAN v. TREVELYAN.—p. 149.

A will destroyed in the life-time of the testator, but without his knowledge, substantiated and admitted to proof.

EDWARD TREVELYAN, Esq. died at Clifton, on the 13th September, 1807; no will was found to be in existence at the time of his death, but it was pleaded that his will had been destroyed during his lifetime without his knowledge.

The two following codicils were before the Court,

of in my former will,
not disposed of, the produce of my

“I bequeath whatever money I die possessed of, as well commissions in his Majesty’s service, as whatever may be in my agent’s hands, or elsewhere due to me, in share and share alike between my brothers Walter and George Trevelyan after paying my just debts; my fishing rods and dogs to Stackpoole; my curricule and horses to Walter and brood mare

and George, these having to pay my debts; my two colts, to Stackpoole. I desire that Richards my late servant a soldier in the same regiment with myself may have his discharge purchased for him if he wishes it.

September 10th, 1807.

“Witness,

Ann Bowsher,
Grace Barton.”

“ED. TREVELYAN.”

“To my late servant Richards, as well as his discharge, I bequeath all the cloaths, regimentals, or otherwise, I may die possessed of; and to Stackpoole my guns.

“Ann Bowsher.

“E. TREVELYAN.”

September 10th, 1807.

Mr. GORDON deposed,

“That he was intimately acquainted with the deceased; that to the best of his recollection as to time, on the 22nd of June, 1807, he dined at the Rev. George Trevelyan’s at the parsonage at Nettlecombe, and he thinks Miss Lyttleton and Lady Elizabeth Percival were there on a visit, and the deceased was also of the party; when the ladies had left the room after dinner the conversation turned upon the deceased’s brother’s the Rev. Geo. Trevelyan’s children, and the deponent observed that Henry Trevelyan one of them, who was the godson of the deceased and also of the deponent, was a fine child, the deceased agreed with him; after talking for some time of the child, the deponent laughing said, if the deceased would leave Henry his heir, he would leave him also £1000; the deceased agreed to this, and the deponent called for pen, ink, and paper, and made the deceased’s will, and witnessed it. To the best of his recollection the will was as follows,

‘This is the last will and testament of Edward Trevelyan of His Majesty’s first regiment of Foot Guards; I give bequeath and devise all my property both real and personal wherever and whatsoever unto my dear godson Henry Trevelyan, the son of my brother George Trevelyan of Nettlecombe, and I appoint the said Henry Trevelyan my godson my residuary legatee.’

“That having made this will, he read the same all over to the deceased; that the deceased understood it, and approved of it, and set and subscribed his name thereto in the presence of the deponent, who also subscribed his name to it as a witness; that during this proceeding the Rev. George Trevelyan reprimanded both the deceased and the deponent for their folly and left the room; that on tea being announced they joined the ladies, and upon entering the room the deceased observed, ‘we have made a man of Henry,’ and they all laughed, but no one was told of the particulars of the will; that upon the deponent’s return to his house he began to reflect that the joke had been carried to a sufficient length, and that it was incumbent on him to destroy the will, supposing the deceased not really serious, and he accordingly destroyed it; that he destroyed it unknown to the deceased, but whether the deceased did or did not remain ignorant thereof till his death he cannot say, as he the deponent never affected the least concealment of his having destroyed the same.”

WILLIAM STACKPOOLE deposed,

“That when the deceased was lying in his last illness at Clifton he was with him, as were also his brother the Rev. Walter Trevelyan and his wife; and Mr. Walter Trevelyan suggested to the deponent the propriety of his brother’s making his will; upon which the deponent immediately went into the room and mentioned it to him, to which he replied that he had made his will when he was ill two years before in Somersetshire, which was written out by Gordon, and that it was in favour of one of his brother George’s children to whom he was godfather, that Mr. Gordon had compounded in case he made him his heir to add £1000 to it; to which the deponent replied, the produce of his commission he thought nevertheless undisposed of, or any pay that might be due to him; therefore he took pen ink and paper, and drew the first codicil in question.” Mr. Stackpoole then proceeded to depose in the fullest manner to the deceased’s approbation and signature of the codicil, and continued his evidence thus, “That the deponent then went

into the next room, where were Mr. and Mrs. Walter Trevelyan, and read to them the codicil, when it occurred to the deponent that it made no mention of the will the deceased had often and so lately said he had executed and left with a Mr. Gordon, and that he had not bequeathed his clothes of which he usually had a great many. He therefore returned to deceased and put the following questions to him by way of ascertaining his recollection in the presence of Ann Bowsher his nurse, all of which he had repeatedly solved to the deponent; 'Where is your will? at Edward's?' 'At Mr. Gordon's, a particular friend of George's, in Somersetshire.' 'Is it the will you have before mentioned to me to have been drawn by Mr. Gordon?' 'Yes. The contents I have often told you of;' or words to that effect. 'Is it your intention that this should interfere in any way with that?' 'No; certainly not;' or words fully to that effect. That the deponent immediately made the interlineation 'not disposed of in my former will,' and asked the deceased whether such were his intention; to which he replied, 'Yes.' " Mr. Stackpoole then deposed to the writing and execution of the second codicil of the 10th September, 1807.

ANN BOWSHER, nurse of the deceased,

Spoke to the attestation of the two codicils above mentioned.

JUDGMENT.

SIR JOHN NICHOLL.

There can be no doubt in law, that if a will duly executed is destroyed in the lifetime of the testator without his authority, it may be established upon satisfactory proof being given of it having been so destroyed, and also of its contents.

The question then comes to the facts, and in this case there is abundant proof of the execution and contents of the instrument, as well as of the destruction of it without the authority or knowledge of the deceased. It is not necessary to decide whether the Court could receive evidence against the fact of execution on the ground that the transaction was throughout a jest; it would be very dangerous to admit any such evidence of intention against the act; though there might be such a possible case, especially if the paper itself contained any thing ludicrous or absurd in its dispositions; against this instrument this species of argument cannot be maintained with effect, for the property is bequeathed to the testator's own nephew and godson.

It appears also from the evidence of Mr. Stackpoole that the deceased was very serious in this disposition of his property; the codicils too are a complete recognition and proof also that he had no knowledge or idea of the destruction of the paper.

Under such proof the Court is bound to pronounce for the will "as contained in the deposition of the witness;" (this is the mode I believe which has been adopted on similar occasions;) and for the two codicils which are sufficiently proved.



DABBS v. CHISMAN, and JENNENS v. Lord BEAUCHAMP.—
p. 155.

A person in possession of an administration is not bound to propound his interest till the party calling in question the grant has first propounded and proved his.

HIBBEN v. CALEMBERG.—p. 166.

A party in possession of an administration not bound to propound her interest till the party calling it in question has established her own.

69 C.C.L.R. 70.

WALLER and SMYTH v. HESELTINE, v. BURGH.—p. 170. 75

Parties propounding different interests to proceed *pari passu*.

ELME v. DA COSTA.—p. 173.

A creditor in possession of a grant of administration entitled to contest suit against a person asserting himself to be next of kin.

LOVEKIN and others v. EDWARDS and others.—p. 179.

A party who had been admitted to sue in *forma pauperis*, dispaupered.

BILLINGHURST v. VICKERS, formerly LEONARD.—p. 187. 3^d 17

Part of a will established, and part held not to be entitled to probate. 3^d 17

JOSEPH LEONARD died on the 6th of March, 1808; on the 21st of the same month, Ann Leonard his sister took out letters of administration to the goods and chattels of the deceased on the ground of his having died intestate. A citation was afterwards served upon Ann Leonard calling upon her to bring in the said letters of administration, and show cause why they should not be revoked, and also why probate should not be granted of the following will to Mr. Billinghamurst the sole executor named in it.

“This is the last will and testament of Joseph Leonard, No. 3, Great Dean’s Court, St. Martins le Grand, Tailor. First, my just and lawful debts paid as soon as may be after my decease, I leave Ann Leonard, spinster, the sum of one shilling; the residue of my property I may possess at my death to be disposed of as under; to Joseph King, of Elgin, 500*l.* 3 per cent Bank Annuities; William Thomas, the same amount, of Queen Street, Cheapside; to Mr. Freebane, at Mr. Creight, Watling Street, the sum of fifty pounds Bank Stock; To Sarah Warner four hundred pounds three per cent Consols; to William Billinghamurst, of St. Martin’s le Grand, five hundred pounds, and to be my whole and sole executor and residuary legatee.”

“Signed this fifth day of March, 1808.

Witness

John Obadiah Jaques,
William Marston.

JOSEPH LEONARD.”

Swabey and *Adams* argued in support of the will.

Jenner and *Edwards* contra.

JUDGMENT.

SIR JOHN NICHOLL.

The question arises on the will of Joseph Leonard, who died on the 6th of March, 1808; he left a sister, the only person who would have been entitled to his property had he died intestate; the will is dated on the fifth of March. The allegation propounding this paper was special; it pleaded the disaffection of the deceased to his sister, and his dislike of her,—his repeated refusal to see her during his last illness,—and his declaration that he had cut her off with a shilling;—that he was much addicted to the immoderate use of spirituous liquors by which he had injured his health, but that his mental faculties save when he was under the immediate influence of liquor were in no degree impaired, and that he wholly abstained from spirituous liquors with the exception of some weak rum and water during the whole of his last illness;—that while confined to the house by his last illness he did with his own hand write so much of the will propounded as is contained between the words “This is the last will” and “Bank Stock,” but that being in a weak state of body he found himself unable to complete and execute the same, and therefore sent for Mr. Billinghamst and requested him to finish it;—that Billinghamst advised him to defer it till the Monday following, when he might be able to write it himself, but the deceased persisted in his request that it should be done then, and accordingly the remaining part of the will was written by Billinghamst from instructions of the deceased, and when it was so done was read all over to and approved by him;—but that he declared he had an intention if he lived till Monday to leave some legacies in charity, and desired Billinghamst to turn over in his mind what public charities were the best objects; but that for fear of accidents he would not defer the execution of his will. The allegation then states the execution in the presence of two witnesses and pleads that the deceased had been intimate with Billinghamst for forty years, and that he had a great regard for Sarah Warner a legatee in the will, who had lived in his service several years and to whom he had often made proposals of marriage.

In contradiction to this it is pleaded in a single article that there were no instructions given for the will, that it was not read over to the deceased, and that he was incapable at the time of execution.

This is the substance of the pleas to the merits of the case; other pleas have been given in exception to the credit of the witnesses.

The two subscribing witnesses have been examined.

The first says that he was brought by Billinghamst, and introduced by him to the deceased, who he says appeared as if he knew him but did not speak; that while he took the pen into his hand he fixed his eyes on the paper writing; that he appeared rational and sensible, and the witness thought he was reading the paper. This witness, from other parts of his evidence, appears a fair and cautious witness.

The second witness is a carpenter, he was fetched also by Billinghamst, he says that the deceased looked earnestly at him, but did not speak, he appeared to read the paper but did not speak; the witness is deaf, but he saw the motion of the deceased's lips and was informed that he was asking where he was to sign.

These two witnesses, therefore, in substance give nearly the same account of the transaction.

The handwriting of the former part of the will and the signature are clearly proved by one witness, and are not ventured to be disproved by plea. This is therefore full proof of an act of execution; and execution generally speaking implies every thing till the contrary is proved; proof of reading over, proof of instructions are not necessary unless the capacity is shown to be doubtful.

In the present instance there are no instructions, and the latter part of the will is written by the executor himself, who is principally benefitted, and who appears to have been the active agent in bringing the witnesses to the deceased's house.

The case resolves itself into one of capacity; unless capacity be impeached, the proof is such as will satisfy the law; if capacity be wholly impeached, the whole instrument may be invalidated; if capacity be partly impeached, a part of it may be invalidated.

It is alleged by the next of kin that the deceased was not capable of making his will for some time previous to his death: they certainly have produced several witnesses, who speak strongly to incapacity; they depose that for three years he was not capable of making his will; but all these witnesses on the cross examination admit that he had given himself up to excessive drinking, that his derangement was occasioned by drunkenness, and upon the whole there is no reason to conclude that he laboured under any incapacity except when under the influence of excessive drinking, and that when free from the effects of liquor he lost his insanity. This however is widely different in a legal view from insanity; he carried on his business himself,—he was a tailor till the time of his death,—he kept his own accounts,—he made his own returns to the assessed taxes;—he was a drunken man and played drunken pranks,—but was not an insane man; where this habit has continued such a person is liable to imposition and his capacity becomes more doubtful and equivocal.

The apothecary and another witness state that the deceased for the last ten days was quite capable of making his will; they also speak to his fixed determination not to leave his property to his sister.

Violent quarrels are proved between him and his sister, and a separation had taken place between them;—both indulged in drinking to an excess;—each frequently threatened to destroy the other's life.

The apothecary endeavoured to bring about a reconciliation which the deceased refused, he spoke of his sister in terms of the utmost dislike and said he had made his will and cut her off with a shilling.

The apothecary's account is confirmed by Dr. Lettsom, who attended him for seven days prior to the 4th of March. Dr. Lettsom forbade him the use of strong liquors except a little rum and water.

This evidence given by medical persons who speak to habitual drunkenness till his last illness, and then to his abstinence from strong liquors, coming in aid of the act of execution, obliges the Court not to pronounce against the whole of the will.

The former part of the will is supported by declarations of the deceased and the evidence of the paper itself, for the whole is in his handwriting,—there is moreover the recognition of his having cut off his sister with a shilling,—and the circumstance of his pointing to the place where his will was deposited. This part therefore could not be set aside unless actual incapacity had been shown at the time of execution.

The difficulty arises as to the remainder of the will, the appointment of Mr. Billinghamurst as residuary legatee, and all those parts of the instrument which were in Mr. Billinghamurst's handwriting.

The Court must take a cautious view in deciding questions of law and fact; it is an established principle, that where capacity is doubtful at the time of execution there must be proof of instructions or of reading over; a man in a languid torpid state may easily acquiesce in signing his name to a will set before him, more especially when he knows that there is something in the paper which he wishes to take effect; the presumption also is strong against an act done by the agency of the party benefitted; the act is not actually defeated as it was by the civil law^(a) provided the intention can be fairly deduced from other circumstances. Though the Court will not presume fraud, it will require strong proofs of intention. Now in this case, was the deceased's capacity so alive as to prevent him from executing an instrument of the contents of which he was not aware? or, was he so languid and reduced as to acquiesce in whatever might be proposed? His constitution and habits were broken up, he languished and died after an illness of a fortnight; the apothecary visited him on the 3d and 4th of March and the deceased died on the 6th; it does not appear directly that he saw him on the 5th, still less at what time on that day he saw him; the apothecary was not apprised that he meant to do any other testamentary act since he showed him the will or rather pointed to it telling him that he had cut off his sister with a shilling.

What then is the fact? the deceased, was gradually wearing out and actually dies within twelve hours after the transaction of the will.

The allegation given in by Mr. Billinghamurst states that he wrote the will from instructions given by the deceased and read over to him; that the deceased read over the will himself and expressed his satisfaction at it, but said that he had thought of leaving some of his property in charities, which he would do on Monday. According to the evidence, the deceased was so worn out that he could not go on to complete his will; the legacies do not go near to dispose of the bulk of his fortune, they amount to about 1200*l.*, whereas his fortune is between 4 and 5000*l.*

Billinghurst fetches the witnesses, two young men, neighbours, and not the persons originally intended by the deceased; the deceased did not speak; at one of the witnesses he looked earnestly; the other he seemed to know; he takes no notice though they were not the persons he expected.

Billinghurst conducts the whole of the transaction, he reaches the pen and the deceased looks at Billinghamurst to show him where to sign, but does not speak or take any notice; the witnesses sign their names and immediately leave the room; this is the whole of the execution;—there is no reading over,—not a word exchanged,—it is all the act of the executor;—what is there to satisfy the Court that the deceased knew the meaning of this addition to his will?—The attesting witnesses give no proof that the deceased by an acquiescing “yes” knew the import of this latter end of the paper.

The silence of the deceased and the active agency of Mr. Billinghamurst increase the demands of the law; there is no appearance affirmatively of fraud or imposition. The Court also does not presume fraud; but the Court demands proof.

(a) Digest: lit. 34. Tit. 8. “De eo quod quis sibi adscriptit in testamento.”

What are the circumstances relied upon in addition to the execution ? declarations that he would give his sister only one shilling, but nothing to show that he intended to appoint Mr. Billinghamst executor and residuary legatee, nothing in the way of previous declaration on this point. The matter is brought up to the account given by the subscribing witnesses and there it ends. There is a complete absence of instructions and of all declarations of intention respecting Mr. Billinghamst; there is no proof that the deceased had any knowledge of the transaction.

At the same time it is to be remembered that he had a great regard and friendship for Billinghamst, and also for the maid servant Sarah Warner, and it is not improbable that he might have intended Billinghamst to be executor, and to have given him and Sarah Warner some legacy, but the Court cannot act upon probabilities; it must have proof.

In the absence of all instructions from the deceased the declaration spoken to by Mrs. Warburton is very material; an exceptive allegation has been given in to the character of this witness; the result of it is that her character is left much where it was. Without an exceptive plea the Court would have been much on its guard for fear of misrepresentation as to a declaration of this sort; Mrs. Warburton states that Billinghamst told her that “a few hours after the deceased’s death, when she was conversing with him on the deceased’s mode of life, and the miserable state in which he died although he was worth so much money, and respecting his being a man of large property; the said Mr. Billinghamst then said, speaking of Joseph Leonard, *he sent for me last night, and he then made something of a will, and he was so very ignorant that he had no idea but that the girl (meaning the deceased’s said servant Sarah Warner,) and I might sign his will, and that that would be sufficient*; or the said Mr. Billinghamst made use of words to that effect, meaning that the deceased thought them, the said William Billinghamst and Sarah Warner, competent to become subscribed witnesses to the said will; and the deponent observed that, as they were not proper persons to sign such will, she supposed the deceased had left them legacies; and Mr. Billinghamst then replied that he (meaning the deceased) had done so, and that he had left him 500*l.* and had pressed him many times over to know if that would satisfy him, and if it did not he should have more, and that the answer he had given was that he was thoroughly satisfied; and he then added that out of the sum of 500*l.* he was to bury the deceased and collect in his book debts and settle his affairs, and that he hoped Miss Leonard would make no disturbance about it, but would pay all the legacies, for there would still be sufficient for her as the deceased had willed not so much as 1500*l.* sterling, as all the legacies consisted of stock except his own which was 500*l.* sterling; and he, the said William Billinghamst, said at the same time that the deceased was tired that night and could not think of any thing more he wished to do, and had desired him to come on Monday following to finish the will as he thought of leaving some legacies to charities.”

It is singular if the deceased did not think he had finished his will that he should interpose an executor and residuary legatee; it has been argued that the declarations of the deceased might have the effect of supplying the two legacies; the Court feels a strong inclination to pronounce for them, but it has considerable hesitation in this respect, being unwilling to depart from its usual rules. I shall take time to consider as to the point of these two legacies; recommending to the parties to con-

sider (particularly as the sister if the deceased had lived would certainly have been cut off with a shilling,) whether they shall not pay them.

I have no hesitation in pronouncing that the party has failed in proof of that part of the will which is applicable to the appointment of the executor and residuary legatee.

I pronounce therefore against the last clause of the will; but in favour of the first part of it; and I reserve the consideration of the two legacies.

BILLINGHURST v. VICKERS, formerly LEONARD.—p. 199.

JUDGMENT on the reserved question.

SIR JOHN NICHOLL.

The opinion of the Court has already been given on the principal part of this case. It has been stated that the first part of this will which was alleged to be in the hand-writing of the deceased is sufficiently proved; but that there is a failure of proof as to the appointment of the executor and the disposition of the residue.

The Court took time to deliberate respecting the proof of two legacies, viz. 400*l.* 3 per cents to a maid servant, and 500*l.* to the executor Mr. Billinghamst.

Considering that the capacity of the deceased was extremely doubtful at the time of execution; that there is a total absence of proof of any instructions for these legacies, or any thing which could be considered as a substitute for instructions; that these legacies are in the hand-writing of one of the legatees; that the whole transaction was conducted by the two interested parties; it would be extremely dangerous to accept declarations however probable and circumstantial made by those very persons after the deceased's death as any and the only evidence to supply the want of instructions, being wholly unsupported by any sort whatever of testamentary declarations, or of recognitions made by the deceased himself. The safer course is to adhere to the rule; that, when the capacity is doubtful at the time of execution, and there is no evidence of instructions, especially where the act is done through the agency of the party interested, the proof of mere execution is insufficient.

I pronounce therefore for that part of the will which is in the deceased's hand-writing, and the executor has failed in proof of the rest.

THE (a) PECULIARS' COURT OF CANTERBURY.

AUGHTIE v AUGHTIE.—p. 201.

Marriage annulled by reason of affinity.

JUDGMENT.

SIR JOHN NICHOLL.

This is a suit for nullity of marriage, by reason of affinity. It is brought by Charlotte Aughtie against William Aughtie, to declare a

(a) A Peculiar, in the ecclesiastical acceptation of the term, is a district exempt from the jurisdiction of the ordinary of the diocese. The Peculiars of

marriage solemnized between them to be void, on the ground of his being the brother of her former husband.

There can be no doubt, if this is the case, that such a marriage is prohibited by law, and "voidable." The facts necessary to be proved, are the two marriages, and that the two husbands were brothers.

Three witnesses have been examined, who very satisfactorily prove the case; Gabriel Waterer states, that he was the uncle of the two husbands, being half brother to William Aughtie, their common father: Rose Bottom was aunt to the woman, and was present at both the marriages: and thirdly, Archibald Campbell Russell was well acquainted with all the parties, the woman and both the husbands.

It appears that Gabriel Aughtie married Charlotte Scott, on the 27th of February, 1791; ten children were the issue of this marriage, of whom eight are alive; the husband died in December, 1806. On the 27th of February, 1808, the widow married William Aughtie; the subsequent cohabitation of these parties, and the birth of a child are proved; the legality of the latter marriage was canvassed before it took place, and strong remonstrances were used with both parties to prevent it.

Under these circumstances, there is clear and satisfactory evidence of the facts necessary to be proved, and I pronounce for the nullity.

A question being raised as to costs.

Per Curiam.

The parties are very much *pari delicto*: The marriage being "void, *ab initio*," the husband has acquired no right over the property of wife. *4 H. 574*
Mr. Russell told her the marriage was illegal, and endeavoured to dissuade her from it, without effect; both parties too are involved in the incest. I shall give no costs.

Per L. M. & D. S. 573.

the archbishops had their origin from the privileged jurisdiction which they exercised in those places where the archiepiscopal palaces and possessions were situated. Within the province of Canterbury there are more than an hundred Peculiars: but the term *κατ' ἐξοχήν* is applied to thirteen parishes within the City of London, and the several parishes composing the deaneries of Croydon in Surry, and Shoreham in Kent, of these the Dean of the Arches is Judge. In the other Peculiars, the jurisdiction is exercised by commissaries; from whose sentence an appeal lies to the Court of Arches.

ARCHES COURT OF CANTERBURY.

BALFOUR v. CARPENTER, falsely calling herself BALFOUR.
p. 204.

(An Appeal from the Consistory Court of Exeter.)

The article of an allegation admitted, which pleaded that a licence granted by the bishop of Winchester's commissary for Surry, would not be valid for a marriage contracted within the diocese of Winchester, but without the jurisdiction of the commissary for Surry.

1 Page, 84.

LOVEDEN v. LOVEDEN.—p. 208.

(An Appeal from the Consistory Court of London.)

Alimony given from the date of the sentence and the appeal.

PANCHARD v. WEGER.—p. 212.

An executor, for whom an appearance had been given, dismissed. And a party having admitted an interest, held not to be at liberty to retract it.

ISABELLA Swainston widow, by her will, dated January 6, 1810, gave her niece, Harriet Weger, 20*l.*, in consequence of ill behaviour, and gave all her other effects to her executors, in trust for John Louis Panchard and Louisa Rosalette, otherwise Rosalie St. Claire, and to her niece, that should be living at her decease, (save and except the said Harriet Mary Weger,) share and share alike, with benefit of survivorship; and her linen and wearing apparel to be at the discretion of her executors; and appointed John Louis Panchard, Richard Reece, M.D., and John Baker, executors.

By a codicil, bearing date 31st January, 1810, she appointed Major John Johnson an executor.

A caveat was entered against these testamentary instruments, which was warned in the name of all the executors. Mr. George Jenner then appeared as proctor for the executors, and prayed probate. Mr. Townsend appeared as proctor for Harriet Mary Weger, and alleged her to be the niece and the next kin of the deceased, and prayed an answer to her interest. The proctor for the executors admitted Harriet Mary Weger's interest; but in the following term he retracted this admission, and denied the same; he declared also that he proceeded no further for John Louis Panchard.

Townsend prayed to be heard on petition. An act in petition was accordingly entered into by both proctors.

By this petition Jenner prayed, that Mr. Panchard might be dismissed from the suit, and that Townsend might be assigned to declare whether he would propound the interest of his client; and Townsend, on the other hand, contended, that the interest of his client having been once admitted, he could not be put on proof of it; and that an appearance having been given for Mr. Panchard, he could not be dismissed before the termination of the suit.

JUDGMENT.

SIR JOHN NICHOLL.

On this petition, amongst several others, two principal points are made—

First, whether a proctor, having given an appearance for several executors, and now declaring that he proceeds no further on the part of one of them, is entitled to obtain the dismissal of that executor?

Secondly, whether a proctor, who has appeared for the executors,

having admitted the interest of the party opposing the will, can now retract that admission, and put the party to proof of his interest?

Mr. Panchard, the executor, for whose dismissal the application is made, was in the East Indies at the time of the deceased's death, and is there now; the appearance, therefore, was given without authority from him; no proxy has been exhibited for him; it is not unusual for the Court to dismiss an executor who has not intermeddled with the effects, or gone to such a length in a cause as to render himself liable to costs. I think in this case, the fact of his absence in the East Indies is a sufficient justification to the Court for dismissing him; his being party to the suit might occasion delay and inconvenience in the administration of justice; he might be called upon for answers. Considering this, and that he has never given any authority for his appearance, I shall dismiss him.

As to the second point, it appears that from two of the executors an appointment had been made of a proctor before the interest of the adverse party was admitted; the third executor afterwards appoints the same proctor.

I apprehend, from the practice of the Court, a proctor will not admit an interest without authority. I must assume therefore, the fact not being denied, that the admission has been made with the privity of all the executors; then the question is, whether they shall now be permitted to retract that admission? In all cases it is the more convenient practice to admit the interest of a party; it saves great expense and delay; by it the party is admitted a contradictor; no ground is asserted for retracting the admission here; no third party can be injured by it; the executors must prove their will; and their admission does not bind any of the next of kin. It has been thrown out in argument on the part of the executors, that if the Court should permit this admission to be retracted, the party opposing the will must go on and prove her interest before she can be admitted to oppose the will; I have always understood the practice to be, that the parties must go on *pari passu*.

In *Burrows v. Belch*, Prerog. Hilary Term, 1793, the interest was denied and propounded; the will also was propounded; but before a witness was examined, the party whose interest was denied, gave an allegation opposing the will. It was objected by Dr. Harris, that he had no right to give an allegation in opposition to the will till he had proved his interest; but the Court said, that in cases of this description the parties were to proceed together, and over-ruled the objection, and I have always understood the rule to be so; it was so held also in *Waller and Smith v. Heseltine, and v. Burgh*, ante, 67.

I should have been of opinion therefore, if the executors had been at liberty to retract their admission, that still the parties must have gone on together; but I shall not permit the interest which has been admitted by the executors to be now denied; as it gives the party no other benefit, than the right of opposing the will.

PASSMORE v. PASSMORE.—p. 216.

An extract from a letter propounded as a codicil, rejected.

HENRY PASSMORE, of Exmouth, in the county of Devon, died in the autumn of 1810.

An allegation was given in propounding a will, dated the 26th of March, 1793, and a codicil, dated the 20th of August, 1798. The will was a formal instrument, regularly executed and attested; but the codicil was part of a letter, written by the deceased, when he was on board a ship, at the Motherbank, and bound on a voyage to the East Indies, to his brother, who was also his attorney; the letter was of very considerable length: the extract propounded occurred in the middle of it, and was as follows:—

“As to your daughters all, they give me pleasure, to see their very great attachment to their parents. Do not mean, however, to exclude Abraham in that particular; he, I know, has a good heart. Also, with regard to Udrey, he, poor fellow, I believe, is not mentioned in my will hitherto, though think he was born at the time it was made; how he slipt my memory I know not; my design was not to do so. I do now empower you, as my attorney, to make him equal with my other nephews. As to Henry, he is heir to his father’s part, and, I suppose, grandfather; if so, he will be best off; indeed I wish it so, for his father’s sake. Oh, how do I bewail the loss of that young man.”

An extract from a memorandum book, in the hand-writing of the deceased, was also exhibited to the Court, viz.

“ Brother Abraham,	-	-	-	£ 500
“ Brother George,	-	-	-	500
“ Sister Jane,	-	-	-	750
“ Jane Mitchell,	-	-	-	500
“ Christiana Brooks,	-	-	-	500
“ Maria Engels,	-	-	-	400
“ Abraham Passmore, jun.	-	-	-	450
“ Udney Passmore,	-	-	-	400
“ Richard Passmore,	-	-	-	250
“ Mrs. Abraham Passmore,	-	-	-	100
“ R. Brook,	-	-	-	100
				£ 4,350

“The above I mean to bequeath to the names opposite the sums.
“ October 12, 1804.

“ HENRY PASSMORE.”

Adams against the codicil.

Stoddart in support of it.

JUDGMENT.

SIR JOHN NICHOLL.

The question arises respecting a paper propounded as a codicil to the will of Henry Passmore.

The allegation pleads the fact of a will in 1793,—several bequests that it contained,—the death of several parties benefited under it,—and that it was formally drawn and regularly executed, and attested by two witnesses.

The third article propounds the paper on which the question arises, and states, that the deceased intending to dispose of the lapsed shares in the will, and to provide for a nephew and great nephew, wrote, when on board a ship at the Motherbank about to sail for the East Indies, a letter, which it is contended may operate as a codicillary disposition.

That the instrument is in the form of a letter is not a conclusive objection against it;—various instruments not exactly in the form of a will, —letters,—deeds of gift,—marriage settlements,—have been held to be testamentary, if the Court has been satisfied as to the intention of the testator. It has been sufficient if they have contained directions how property should be disposed of in the event of death; nor has it been held necessary that they should be in direct and imperative terms; wishes and requests have been deemed sufficient.

The Court must judge from the form of the paper,—from its nature,—contents,—and appearance,—whether it was written and intended as a formal permanent will, which it must be presumed the deceased meant should operate unless some act was done to revoke it; or whether it was a deliberative and temporary paper, which expressed the impression and wishes of the moment, and was never afterwards thought of or adverted to. In the latter case, it can only be established by the aid of extrinsic circumstances. This principle, I apprehend, was recognized, restored, and re-established by the Court of Review in the case of *Matthews v. Warner*, 4 Vesey Jun. 186.

The paper in the present instance, is a very long letter, written by the deceased to his brother, who was also his attorney, just previous to his setting sail on an East India voyage: the letter embraces all sorts of subjects, some important and some trifling; it is written with erasures and alterations; in the midst of it the passage which has been propounded occurs.

What would have been the effect of this letter if the deceased had died during the voyage, and while his brother continued to act as his attorney, would have been a different question; but I cannot suppose he intended this as a permanent testamentary act, nor perhaps as any testamentary act at all; though, if he had died on the very voyage, it might have been established as deeds of gift and instruments sometimes are, in order to prevent intentions from being defeated. But the deceased returned from this voyage; he lived a great many years afterwards; and it is not pleaded that he ever made the least reference to this letter; nor is there the suggestion of any recognition in it: but something of a contrary inference is to be deduced from a book which has been produced, containing a memorandum of persons to whom he intended to bequeath his property; this memorandum is dated October, 1804. The disposition is on a different plan; specific sums are given to each person, instead of dividing the property into parts; he had made a former will, in a regular and formal manner; he intended to make a future will after the same manner.

Upon the whole view of the circumstances, I am satisfied that the deceased never intended this letter to operate as a permanent disposition of his property; there is nothing to repel the presumption against it of an incomplete and imperfect paper; and I shall, therefore, reject the allegation.

ARCHES COURT OF CANTERBURY.

BALFOUR v. CARPENTER, falsely calling herself BALFOUR.—
p. 221.

An Appeal from the Consistory Court of Exeter.

A marriage annulled by reason of the minority of the husband, and the want of his father's consent.

HIGH COURT OF DELEGATES.

COPE v. BURT, falsely calling herself COPE.—p. 224.

An Appeal from the Arches Court of Canterbury.

A marriage under a licence, in which one of the parties was described by a false Christian and surname, held to be valid.

ARCHES COURT OF CANTERBURY.

TATTERSALL v. KNIGHT.—p. 232.

An Appeal from the Consistory Court of Gloucester.

A faculty for the erection of a gallery in a Church granted, notwithstanding the opposition of the Vicar.

PREROGATIVE COURT OF CANTERBURY.

PHILLIPS v. BIGNELL AND OTHERS.—p. 239.

An executor bound to exhibit an inventory account, at the suit of a party interested in the property for which he is executor.

DANIEL LAMPETT, a yeoman of Horknorton, in the county of Oxford, died in the year 1796, having made a will, by which he constituted

Richard Benjamin Bignell, Williams Meads, and David Salmon, his executors; and bequeathed property of various descriptions to be equally divided amongst his three daughters; their several shares to be paid them on their marriage, or their attaining the age of twenty-one years; but in the event of one of them dying before either of these contingencies, then her share was to be equally divided amongst the survivors.

The executors took probate of the will in the Prerogative Court of Canterbury, in October 1796. The two eldest daughters married, one in 1805, the other in 1806, and their husbands received their respective shares of the property;—the youngest was still a minor, (about seventeen years of age,) and unmarried.

In November 1810, a citation issued at the promotion of the husbands of the two married sisters against the executors, to exhibit a full and particular inventory of all and singular the goods, chattels, and credits of the deceased, which at any time since his death had come to their hands, possession, and knowledge. The executor objected to comply with this citation, on the ground that they had paid the two eldest daughters their shares of the property on their respective marriages, and had received their husbands' receipts in discharge of them; and further, that the sums paid them exceeded in amount their distributive proportion.

Swabey for the executors.

Barnaby, contra.

JUDGMENT.

SIR JOHN NICHOLL.

This is a proceeding against the executors of Daniel Lampett, for the purpose of compelling them to exhibit an inventory and account:—the executors object to doing this, but the law does not readily admit objections.

The Canons require an inventory to be exhibited, even before probate is granted; and this was the old practice of this Court, and, indeed, is still the practice in some country jurisdictions. The statute 21 H. VIII. c. 5. s. 4, requires executors and administrators to exhibit inventories as part of their duty, without any proceedings to call upon them to do so.

The modern practice, however, is certainly not to render an account unless it shall be called for; but the executor must remember that he has bound himself by his oath to render a just account when he is by law required. The Court may, and in some instances does, for the protection and security of the parties interested, require ex officio that an inventory shall be exhibited; and though the Court does not exact this in all cases, still it always will, where a party having an interest in the property applies for it.

It has been laid down in a variety of cases, that a probable or contingent interest will justify a party in calling for an inventory and account. This was so held in *Salter v. Sladen* (a), *Snow v. Strutt* (b), and *Myddleton v. Rushout* (c). It is not necessary to particularize the circumstances of these cases; but in all of them it was laid down that a probable or contingent interest was sufficient, because the production of an inventory was so much a matter of duty, that the executor

(a) Prerogative, Michaelmas Term, 1792.

(b) Prerogative, Hilary Term, 1793.

(c) See the next case, p. 81.

was bound to exhibit it, even where there was *an appearance* of interest in the party calling for it. My predecessor so much discouraged all hanging back in cases of this description, that he has generally condemned the parties who have been guilty of it, in costs.

In the present case, the executors proved the will in October 1796; they are now cited by two of the daughters of the testator, who are also two of the substituted legatees to exhibit an inventory: it is argued, that they are barred from making this demand, because their respective husbands have received releases for their several shares from the executors. On the other hand, it is stated that the accounts are loose and incorrect; this again is denied, and it is asserted in reply, (which certainly appears very extraordinary,) that the sums paid exceeded the amount of their respective shares.

Here then is a considerable estate, consisting of various descriptions of property, to be sold and divided.—monies to be advanced for the maintenance and education of children,—interest to be calculated on the respective shares,—and in short, an estate so circumstanced, that one can scarcely figure to oneself a case in which a more exact inventory and account ought to have been kept and stated.

Two out of the three daughters are married, and accounts of their property have been rendered to their husbands; but it is not averred that they were full and perfect accounts, all the executors state is, that the husbands received the shares, and gave releases for them; and the husbands might on their respective marriages, have accepted them in unsuspecting confidence; but they are mere receipts, not releases, and certainly not releases given on a due investigation of all the accounts. I am not prepared to say that they would be a bar, even if the parties had no contingent interest; but here they are residuary legatees, to them they can be no bar; if the unmarried sister were to die before marriage, or under age, they would be entitled to her share: but, independently of this consideration, the share of the unmarried sister cannot be ascertained without a precise inventory and account; and the Court would almost *ex officio*, for the protection of her interest during her minority, direct an inventory and account to be exhibited.

Lapse of time may sometimes weigh with the Court; the Court would be unwilling to open old accounts where documents have been lost, and vouchers destroyed; but the argument founded on lapse of time does not apply in the present instance, since as one of the parties is a minor, all the documents and vouchers must have been preserved, and it is difficult to surmise why the executors should refuse to produce them;—when the minor attains the age of maturity, or marries, she will have an undoubted right to call for them. No inconvenience, therefore, can arise to the parties from exhibiting them.

Upon the whole, I think there is no ground or colour for this refusal; when parties are acting fairly, they are rather desirous of making a full disclosure than of attempting to raise objections to it. The Court is bound to discourage and discountenance any backwardness in cases of this description; and I think I am only following the example of my predecessor, when I condemn the executor in costs.

MYDDLETON v. RUSHOUT.—p. 244.

An executor bound to exhibit an inventory and account, at the suit of a party having an interest in the property for which he is executor.

A CITATION was taken out by the widow of Richard Myddleton, Esq. of Chirk Castle, against the executors of her husband to produce an inventory; the executors objected to comply with the citation, on the ground that the widow was not so interested as to entitle her to call for an inventory, as by her marriage settlement she had 500*l.* per annum settled on trustees for her. To this it was replied, that there was a covenant that there should be paid at several instalments money to make up 5000*l.* stock, or in the event of her surviving her husband, so much as would make up the 5000*l.* stock; that nothing as yet had been paid towards making up this sum, consequently, the 5000*l.* stock was due to her, and she was entitled to an inventory.

Sir *William Scott*, for the executors.

This application rests on two grounds; *first*, That an executor is under a general obligation to deliver an inventory without the application of any person. *Secondly*, That the party in this suit is a creditrix, and therefore has a specific interest.

As to the first point, it is true, the executor engages to furnish an inventory when required by law; but he is not considered as imperiously obliged to deliver it, unless at the instance of a person interested; at least it is not the practice of the Court *ex officio* to call for one; therefore, there has been no failure of duty. *Secondly*, The parties usually applicants are the next of kin, or creditors who are immediately and directly interested; but here the party states herself to be interested under a marriage settlement by which money was to be paid, partly in the lifetime of the husband, and partly after his death, to trustees for her use; thus she is a creditrix only in equity; the legal creditors are the trustees; the widow's interest is merely equitable, and not to be attended to in a mere court of law.

When legacies are in trust, it is always held that the trustee, and not cestui qui trust, must sue.

Dr. *Nicholl*, contra.

The Court will call for an inventory on the showing of any kind of interest. In *Sladen v. Salter*, Prerog. Mich. Term, 1792, a suit was pending before the Lords of Appeal on a question of joint capture; it was not determined whether Sladen would be entitled to claim any thing from Salter; and, therefore, it was argued that he had no interest to entitle him to call upon Salter's executors for an inventory; but the Court held that where even the party can show any kind of interest, it will enforce the call for an inventory. That this could be no hardship, for the executor was bound both by the stat. of H. VIII., and his oath, to do it, though this was not ordinarily, and in all cases enforced; the Court held that a probable interest was sufficient, and said that it knew no case where such an interest had been shown, and the application had been refused.

The wife has an interest here; a certain sum should be raised for her use; none of that money has been paid; she has an interest to discover the effects; suppose she wanted to institute a suit to compel the trustees

to recover, it would be necessary to see all the assets; but she is the person really interested, for the trustees are to pay over to her.

JUDGMENT.

Sir W. WYNNE.

This is a suit brought by the widow against the surviving executor of her husband for an inventory; the executor has appeared under protest, stating a settlement, and that on 2,500*l.* being granted to Mr. Myddleton, 500*l.* was assigned to trustees to be set apart annually, paying interest to her; and if by this payment at the death of Mr. Myddleton, it did not amount to 5000*l.* stock, his executors were three months after his death to pay that sum to trustees for her use. It is stated that no such sum has been paid, so that 5000*l.* is now due to her from the estate; this is not denied, but it is contended that she is not a legal, but an equitable creditor, and that therefore she is not entitled to an inventory.

I never heard of this distinction, nor can I see any reason for it; the legal interest cannot be enforced in the Ecclesiastical Court more than the equitable one.

The statute of H. VIII. requires all executors to give an inventory; this is not required of all executors in practice, and the Court always enquires into the interest of any party requiring one; but when it sees any kind of interest, it enforces that which is by law generally required.

I know of only one case in which it could be refused; i. e. if a creditor had brought a suit in Chancery for a discovery of assets in such a case, the Court has said that the party shall not proceed in both Courts; this is not suggested here. I see no ground for the objection, and I pronounce against the protest, with costs.

MOSS v. BRANDER.—p. 254.

A will set aside for want of adequate proof, and one of an earlier date established.

JUDGMENT.

Sir JOHN NICHOLL.

This case arises upon two wills of Hannah Brander, and it has required the full attention of the Court. The deceased was a feme covert.—I have already^(a) decided, that under a power given to her in the form of a bond, she could make a will; and that I am bound to enquire into the factum of the instruments propounded.

One of them is propounded by Moss, who is not an executor, but the residuary legatee; it is dated the 25th of August, 1801.—The other is propounded by the husband, and is dated the 25th of May, 1806.

The former is regularly prepared, formally executed, and attested by two witnesses. The drawer of it (Mr. Bevan) has been examined; and he proves that the instructions were given by the deceased, that he prepared the will from those instructions, and delivered it to her. One of the subscribing witnesses proves the execution; and the death, and character, and handwriting of the other, are also proved. So that the factum of this will being established, it would be entitled to probate, unless revoked by the subsequent will; and the true question in this case is, the factum of the second will.

This will is not formally drawn up;—it is on a scrap of paper written

(a) Trinity Term, 1809.

on both sides;—it is attested by only one witness, Mr. Wilson, who is also the drawer of it;—he describes himself as a calico glazer, and says, “He was slightly acquainted with the deceased for about two years, by occasionally calling at her husband’s house; that on a Sunday afternoon, about the 25th of May, 1806, he called; and after having been there some short time, the deceased asked him if he would write her will; the deponent told her he had no objection, but it was a thing he had never done for a person in his life. Her husband offered to go for some paper; the deceased said no, there is a piece on the table that will do; I have not a great deal to say, for I am very ill, and shall not be able to sit up long.” That he then wrote according to her order; and the paper being shown him, he says, “that he drew and wrote the same by the dictation and desire of the deceased, and in her presence, and in the presence of her husband; that he then read it all over to her, and she said she was very well satisfied with it, and asked her husband if he was so, and he said yes. That the deponent then asked the deceased if she would sign it, and she said yes, and set her name thereto. That he thought there should be a seal; she said, there is one on the table, I will put it on myself, which she did, and said she declared it as her will, and asked the deponent if it would be proper for him to sign it, and the deponent accordingly signed his name as witnessing the execution thereof.”

Now the evidence of this single witness, being the only proof offered in support of the will;—a will exclusively in the favour of the husband; made in the presence of the husband, when the deceased is stated to have been very ill;—and notwithstanding her marriage, (being then a widow,) she had reserved a power of disposing of certain property, and had actually exercised that power in 1801, in favour of her relations, the evidence of this single witness, requires to be carefully considered, for it is only on the full belief of his testimony that the will can be established.

His account then is, that he was only slightly acquainted with the deceased by calling on her husband;—he was, therefore, the friend of the husband;—that he never drew a will before in his life;—that this will was written off at once upon this sheet of paper, without any draft, or previous note or memorandum;—that it was immediately read over,—and immediately signed.

Then, let us observe how this calico-glazer, writing at the dictation of this sick woman, who herself from another paper which has been exhibited appears to have been but an illiterate person, has expressed this will—and how the paper is written;—it is in these words:—

“This is the last will and testament of me, Hannah Brander, of Susannah Row, Shoreditch, in the county of Middlesex, which I now make and publish by virtue and in pursuance of the settlement made on my marriage with my present husband, Andrew Brander, in manner following:—I give and bequeath the sum of five hundred pounds of lawful money of Great Britain to my present husband, Andrew Brander, which was settled on me at my marriage with him, hereby revoking all former wills by me at any time heretofore made, and do declare this only to be my last will and testament. In witness whereof I have hereunto set my hand and seal, this twenty-fifth day of May, one thousand eight hundred and six; HANNAH BRANDER, (LS.) in the presence of witness,

[“WILLIAM WILSON.”]

Here then is as perfect and as technical a form of words as could possibly be used, not only in the formal, introductory, and concluding parts, but in the disposition itself;—it is written quite fair,—there is not a single omission,—erasure,—or amending,—except in the spelling of the word following. He confirms, and more strongly ties himself down upon interrogatories, that it was no copy.—He was asked whether he did not make such will from a copy, and his answer is, “No,” and on another interrogatory he says, “I did not hear of the will in favour of her relations till after her death.” “That he will take upon himself to swear, having perused the will of 1801, that he did not take the form of the will from a copy thereof.” So that he even excludes the deceased from having any copy before her; for if she had, he would have mentioned it either in his examination in chief, or on this interrogatory.

This would be difficult to believe in itself, that persons of this description should be able *uno contextu* to draw up such an instrument in such formal and technical terms; it is equally formal in the introductory, in the dispositive, and in the concluding part.—But what renders it still more difficult of belief is, that the introductory and concluding parts are verbatim the same as in the will of 1801;—and yet the witness does not pretend that that will was then produced;—nor is it likely, when the other evidence comes to be examined, that it could have been produced.—Indeed, it is pretty strongly proved in the case that the instrument was not in the possession of the deceased;—but it is also fully proved that a copy of it was delivered to the husband by his own desire, after the deceased’s death;—and the husband admits in his answers that he was not informed of the contents of this will till after the deceased’s death, so that it could not have been produced on the 26th of May;—that so precise a coincidence of wording should have taken place without being copied, and in a paper not drawn by a professional person, is almost beyond belief.

There is another circumstance of suspicion, namely, that the ink of the signature is quite of a different colour from the body of the will;—the whole name is written in a much deeper ink, and all is equally black;—and yet the witness says it was signed by the deceased immediately after the body of the instrument was written by him.—It is also observable that his own name, which he says was written after the deceased’s signature, is in the same coloured ink as the body of the instrument.

When this name was written,—or how the signature was obtained,—or whether it is in the deceased’s handwriting, (for it is a hand easily imitated,)—or how it was signed,—it is not necessary for the Court to conjecture;—but if the case rested here, I should find great difficulty in giving credit to this evidence.

Though Mr. Brander gave in a second plea, yet he has not attempted to aver any circumstance to support the act;—there is not the testimony of a single witness declaring that the testatrix intended to benefit her husband by this property;—there is nothing in the shape of a recognition,—though she lived near a fortnight afterwards.

In answer to a charge that he treated her cruelly in order to obtain a will from her, he has produced two witnesses, who say that they appeared to live comfortably together, and that is all.—There is nothing

stated of particular affection and regard towards her husband,—or of alteration of regard towards her relations.

He has pleaded the finding of this paper after the deceased's death;—but no evidence of that fact, or even that it was in existence till long after her death, has been produced;—there is nothing, therefore, to uphold the witness Wilson.

How then stands the evidence on the other side?

Ann Bull was intimate with the deceased and her opposite neighbour for ten years; she says, “that the deceased told her about a twelvemonth before her death, that her husband had given her a bond on her marriage that she should have 500*l.* at her own disposal; she often told her she had made her will, and within two or three days of death told her she would not alter it; that about a twelvemonth before her death, she brought some papers to the deponent, and desired she would take care of them, and not let Brander or any other person know that she had them, and said they were the bond, and the leases of her houses, and her will; that soon after the deceased being very indifferent, the deponent wished her papers to be removed, that the deceased brought a tin box, put her papers into it, took them away, and left them as she believes with Sarah Leighton. That the deceased many times told her that her husband wanted to get possession of her will; but that he never should.”

SARAH LEIGHTON says,

“That the deceased brought a tin box to her, said her will was in it, and requested that she would take care of it for fear her husband should get it; that the deceased sent for the deponent several times during her last illness, but she was at Walthamstow; that when she returned, she understood that the deceased had sent her niece for the tin box, and that the deponent's daughter had delivered it to her.”

ANN PASCALL, (the deceased's sister,) deposes,

“That on the morning after the deceased's death, she told Andrew Brander that she had the deceased's will, and all her writings; and Brander said, ‘that's right, take care of them, I only want a copy.’ That a copy of the deceased's will was made and sent to Brander.”

Here is a strong adherence to the will of 1801;—an anxiety that the instrument should not come within reach of her husband;—it satisfies me also, that the will of 1801 was not produced to the husband and Wilson on the 25th of May, when it is pretended this last will was made;—Brander desiring to have a copy is a strong disavowal of the will of May 25 being then made, and may account for that instrument, when it was afterwards produced, being in the same technical form as the will of 1801.

ANN BULL, (the witness first mentioned,) also says,

“That the deceased frequently told her Mr. Brander used her ill because she would not alter her will, and make a will in his favour, but that she never would; that he used her ill one night on the account she would not put her hand to a paper because he would not let her see what it was.”

This would impose upon Brander the burthen of proving very satisfactorily, that a will made in his presence, and when his wife was described as very sick, was the free and voluntary act of the deceased.

The witness goes on, “and that on the next day after she had so refused she found the paper in a box,—that it was a will Brander had

made in his own favour, and she had copied it off and given it to some friend, and put over the top of it that it was a forged will in case it should be brought forward after her death."

This account in its different parts is confirmed by three other witnesses;—the paper so copied by the deceased is before the Court, and Elizabeth Pascal, (a niece,) says it was deposited with her father.

The instrument purports to be a will of the deceased's, giving her leasehold house and all her property to her husband, and is dated in 1803, but not signed; at the top there are written these words, "this is the copy of a forged will in my name."

This evidence on the one hand renders it most highly improbable that the deceased should voluntarily have departed from the will of 1801, and disposed of her property in favour of her husband;—and on the other, must excite the greatest jealousy of an instrument produced by the husband,—and supported by one single witness in the manner already stated.

ELIZABETH PASCAL says,

"That on the Sunday previous to the deceased's death, she was sent for to attend her; that on the Wednesday following, Mr. and Mrs. Cheswick drank tea with Brander; that Brander came down and told the deponent that her aunt was going to alter her will, but that there was a witness not come; that a person came soon after, but Brander took care she should not see him; that Brander came down into the kitchen, and fetched the pen, and said, he is come, we shall soon settle the business. That Mrs. Cheswick soon after came down, and the deponent asked her if her aunt had been settling her will; she said she had not. That the deponent not feeling fully satisfied, asked her aunt herself; the deceased said, 'No, she had had a paper brought to her to sign, but she said, let those that make wills sign them, she would sign no more than what she had already signed, and that should stand good.'" She made similar declarations on the following night.

That there was some attempt to obtain a will on this Wednesday, and that the deceased declined it, is confirmed by Brander's own interrogatory (a).

Whether this was a proper or improper attempt, the Court has it not in its power to judge, for Mr. Brander has not thought proper to explain this transaction; he has not pleaded it, though he has given in a second allegation; nor has he examined Mr. Selby, or Mr. and Mrs. Cheswick; therefore, the appearances and presumptions are against him. But the transaction bears upon the case in another way; it renders it highly improbable that this will of the 25th of May, (only ten days preceding,) should have been made at all; for if it had been made, it must have been in some manner referred to, and recognized by Mr. Selby; and if it had been so recognized, that circumstance would certainly have been pleaded, and proved.

(a) The interrogatory was addressed to Ann Pascal, and to this effect:—"Were you present in the room with the deceased about two days preceding her death, when Mr. Brander brought a will to her as articulate, and requested her to sign it, which she refused?—Will you take upon yourself to swear that it was Mr. Brander himself, who brought the said will to the deceased?—Upon your oath, was not that will brought by Mr. Selby, the attorney who prepared it?—Will you swear that the ministrant requested the deceased to sign it, and that any thing was said upon the subject of signing the same, either by Mr. Selby or the ministrant."

Within two days afterwards the deceased dies:—what is Brander's conduct?—The will of the 25th of May is not produced;—Mrs. Pascal tells him she has the deceased's will;—the will of 1801, and other papers. He replies, "that's right, take care of them, I only want a copy."—He receives a copy;—he enters a caveat against it,—but does not produce his own will, or assert its existence;—the objection he took to the will of 1801 being, that it was not a legal execution of the power.—In August 1806, he files a bill in Chancery against Ann Pascal, to recover possession of the leases, and other papers relating to the deceased's houses; in that bill he asserts that the deceased had died intestate, not suggesting then that he had in his possession a will which revoked all former wills. Ann Pascal, in answer to Brander's bill, claims her right under the will of 1801, and Brander has not ventured to proceed with his suit. And it is not till May 1807, that this latter will first makes its appearance.

A caveat being entered against the will of 1801, Moss, the surviving executor, being in indigent circumstances, and having no direct interest himself, and being in some doubt whether the will of 1801 was a good execution of the power, does not institute a suit; and the matter having rested quiet for near a year, Brander produces the will of May 1806, and takes administration with that paper annexed, in May 1807.

In explanation of the bill in Chancery, in which he stated the deceased to have died intestate, Mr. Brander in his plea alleges, "that he did acquaint his solicitor, Mr. Samuel Parkinson, of the will propounded by Moss, and also informed him that the deceased had made another will, bequeathing to him the property she had power to dispose of; but what was become thereof, he did not know."

This is an important fact; for at least it would have shown that he averred the existence of this will shortly after his wife's death, and it would have taken off the effect of his having alleged in his bill that she died intestate. Mr. Parkinson is produced and examined on this article of the plea, and on this article only. Mr. Parkinson, in his deposition in chief, speaks to the filing of the bill, and says, "that in the bill it was stated that Hannah Brander was dead intestate, and that Andrew Brander was then taking steps for obtaining letters of administration of her effects; that Pascal kept possession of some writings under pretence of there being a will, but that his wife had no power to dispose of those leases by will."

Not suggesting, therefore, that such will was revoked by a subsisting will; but on this part of the plea, "that the deceased had made another will bequeathing to him the property she had the power to dispose of; but what was become thereof he did not know."—In this very important part of the article, the very gist of it, *Mr. Parkinson knows not to depose*. This is rather a strange way of getting over it: the examiner ought to have required a specific answer to that part of the article; but coupling this with the answer of the witness to the interrogatories, the Court is at no loss what inference to draw from it.—He is cross-examined directly to this fact, on the third interrogatory.—He had answered this interrogatory, but he afterwards has that part of his answer expunged, and then instead of further *knows not* to answer, says, and further *declining* to answer:—and in like manner he declines answering several other interrogatories.

Now, whether he was or was not bound to answer the other interrogatories may depend upon their contents, and it is unnecessary to ex-

amine into that point; but in his deposition in chief to that fact so pleaded, and to this interrogatory directly applying to the fact pleaded, I think he was bound to answer.

The privilege of not answering to facts communicated to him confidentially by his client is not the privilege of the attorney himself, but of the client; and if the client waves the privilege, the attorney cannot refuse to answer.—Here Brander had pleaded the fact;—had vouched Parkinson, and had produced him on this very article;—he has sworn to speak the truth, and the whole truth.—This was a waiver of privilege as to this fact;—and he being produced to prove the fact, the adverse party had a right to cross-examine to it. Mr. Parkinson, however, having declined to answer when he was bound to answer, the Court must infer that he negatives the fact;—it is pretty much the same as if he had expressly said that Brander did not communicate to him in August 1806 the existence or making of this will of May 1806.

If so, if consulting with his attorney at this very time in August 1806 upon this very subject, viz. his right to the deceased's property—that property claimed under a will of 1801; relying only that such will was not executed in conformity with the power of attorney, and, therefore, alleging that the deceased died intestate; it is next to incredible that the deceased could have made this will with an express clause of revocation, and in the presence of Brander himself, and that Brander should never have mentioned such a circumstance or transaction to Mr. Parkinson.

At all events, supposing Parkinson was bound to decline answering, there is then no proof that Brander did mention it; and the case must be considered as one in which there is an absence of proof.

That Brander made any search for the will on the death of the deceased,—or ever intimated when Mrs. Pascal gave him a copy of the will of 1801 and claimed under it, that the deceased had made a subsequent will, there is no proof.

When the will was made;—whether the body of it was written before or after the death of Mrs. Brander;—whether it is or is not of the handwriting of the deceased;—it is not necessary for this court to decide: the party setting up the instrument must furnish proof that it was made by a free and capable testatrix.

Putting then in one scale the evidence of this single subscribing witness, supported only by two witnesses to similitude of handwriting;—in the total absence of any testamentary declarations or recognitions of such an act;—and without any circumstances showing a probability that she should so execute the power given to her by her marriage settlement.—And putting into the other scale the inconsistency between the instrument itself, and the account given by the subscribed witness,—the acts,—the conduct,—and the declarations of the deceased herself, contradicting the whole transaction,—and the acts,—conduct,—and declarations of Brander himself, so inconsistent with the making of this instrument—I feel no difficulty in pronouncing that he has failed in proof of this will; and as the transaction he has undertaken to prove, whatever it was, passed within his own knowledge, he having failed to prove it, has, I think, rendered himself liable to costs.

I therefore pronounce for the will of 1801, and condemn Mr. Brander in the costs of this suit.

HIGH COURT OF DELEGATES.

WATSON v. THORP.—p. 269.

An Appeal from the Consistory Court of York.

The Judges who sate under this Commission were

Mr. Justice LE BLANC,	Doctor ARNOLD,
Mr. Justice CHAMBRE,	Doctor PHILLIMORE, and
Mr. Baron GRAHAM,	Doctor EDWARDS.

A clergyman suspended for three years for immoral conduct.

HILL v. BULKELEY.—p. 280.

The deposition of a witness, who died before he had been repeated, and before he had been examined on the interrogatories of the adverse party, admitted.

AN allegation was offered for the purpose of inducing the Court to receive the depositions of W. R. Dowling, a witness who had been examined in chief, and had signed his deposition, but had died before he had been repeated, or examined on the interrogatories of the adverse party.

Adams and *Stoddart* against the admission of the allegation, argued

That it was no deposition till it was sworn to;—and referred to Oughton, *Ordo Judiciorum*, tit. 85. s. 8. et supra.

Jenner and *Edwards* contra, cited Lord *Arundel v. Arundel*, *Viner's Abr.* Vol. XII. p. 108. tit. Evidence.—Ch. Rep. 90. 10 Car. 1. *Ld. Arundel v. Arundel*.

JUDGMENT.

SIR JOHN NICHOLL.

The examination certainly is not complete,—but under the circumstances, the Court may receive something short of the regular examination. The examination in chief comes as near to a regular examination as it well can, for the deposition was read over, and actually signed. The single defect on this point is, that it was not repeated to him;—and on the other hand, he has not been cross-examined,—but this has been prevented by the act of God.

The case from *Viner's Abridgment*, though it relates to the practice of another court, is directly in point. There is likewise a case in 1 *Peere Williams*, 414, *Copeland v. Stanton*, in which Lord Chancellor Parker admitted the depositions of a witness under similar circumstances. In Chancery, it should seem the deposition is considered as complete, when it is read over and signed.

Upon the reason of the thing, and the authorities cited, this evidence

is admissible, if the facts pleaded in the allegation shall prove true; the deposition, however, must be read at the hearing of the cause, with some deductions, because it is possible that the cross-examination might have discredited the witness. Subject to these observations, I shall admit the allegation.

ARCHES COURT OF CANTERBURY.

The office of the Judge promoted by NEWBERRY v. GOODWIN.—
p. 282.

(Brought by letters of request from the Consistory Court of Chester.)

A clergyman in the performance of divine worship, not at liberty to alter or omit any part of the service.

PECULIARS' COURT OF CANTERBURY.

SMITH v. HUSON, falsely called SMITH.—p. 287.

The marriage of a minor by licence with the implied consent of the father established. [Sentence affirmed by the Court of Delegates, Dec. 11, 1811.]

PREROGATIVE COURT OF CANTERBURY.

NEWHAM v. RAITHEY.—p. 315.

Copies of the register of a Dissenting chapel not to be pleaded as evidence.

OBJECTION was taken to an article in an allegation which pleaded the copy of a register of a dissenting chapel.

JUDGMENT.

SIR JOHN NICHOLL.

This is not evidence that can be admitted. The Court can only admit *copies* of public documents which are in official custody.

Extracts from a register of this description must be considered as mere private memoranda:—the books themselves, however, may be produced at the hearing of the cause, and be made evidence to a certain extent: by this means the party will have the benefit of them, though in a different manner from that in which they have now been attempted to be introduced.

ARCHES COURT OF CANTERBURY.

PETTMAN by his Guardian v. BRIDGER.—p. 316.

A possessory right in a pew is sufficient to maintain a suit against a mere disturber.

PREROGATIVE COURT OF CANTERBURY.

STRIDE v. COOPER.—p. 334.

The latest in point of date of two wills established, the republication of the first not being proved.

THE deceased was William Dredge, originally a shoemaker, but who in his latter days kept a garden, and sold the produce of it;—he resided in the New Forest, and died there on the 10th of April, 1810, leaving two relations, the one Rebecca Cooper spinster, a second cousin, the other Mary Stride a widow, his first cousin. The former lived with him several years immediately preceding his death, as his housekeeper. The latter was a cripple, and resided at some distance; and on that account, as it appeared from the evidence, was not in the habit of any great intimacy with him; but there was proof sufficient that he entertained a very affectionate regard towards her.

Two wills were before the Court. The one dated Feb. 7, 1801, entirely in the handwriting of the deceased, and attested by three witnesses, in which, after leaving a legacy of 10*l.* to Mary Stride, and his wearing apparel to Robert Cooper, he bequeathed all the rest and residue of his property to Rebecca Cooper. This will was found in an envelope with the following endorsement:—"Wm. Dredge's will, dated Feb. 7, 1801." The paper of this envelope appeared from the water mark to have been made in 1806. The factum of this instrument was not disputed.

The other will bore date on the 8th of July, 1803; by this he gave a legacy of 10*l.* to Rebecca Cooper, 50*l.* to another more distant relation, and the whole of the rest and residue of his property to Mrs. Stride, who was also joint executor with her husband.—The factum of this paper was also most fully proved;—it was not, indeed, in the deceased's own handwriting, for on this occasion he had had recourse to Mr. Strickland, a solicitor, of Fordingbridge, who deposed most fully to the instructions of the deceased, to his execution of them, and his complete capacity; and he was confirmed in his deposition by the other two attesting witnesses.

In the allegation offered in opposition to this latter instrument, neither fraud nor incapacity were suggested;—but the case set up was the revival of the first will in such a manner as to revoke the second, and this by no formal act of republication, but by circumstances taken together, and amounting as it was contended to a republication.

Swabey and Adams for Mrs. Cooper,

Contended that the facts proved in the case amounted to a legal republication of the will of Feb. 1801.

Jenner and Phillimore for Mrs. Stride, contra.

JUDGMENT.

Sir JOHN NICHOLL.

No formal act of republication is proved; but a collection of circumstances is taken together, which have been argued to amount in substance to a republication.

I will not venture to lay down decidedly, that no act short of a direct and formal republication would be sufficient to revive a former, and revoke a latter will, both instruments remaining perfect; but it certainly would require either a second publication, or very unequivocal circumstances. The animus revocandi must be very clearly established, otherwise the last dated will uncanceled must remain in force;—the presumption of law is decidedly in its favour.—It has been pressed upon the Court that slight circumstances will amount to a republication, but the authority relied upon for this assertion, by no means bears it out(*a*). Wentworth says, that “if the testator is speechless, his act shall supply the words of republication;” but still a clear act of republication is required, and this is put in an extreme case, and in my mind it goes a great way to show that there must be some direct and unequivocal act.

In the present case, the circumstances are these:—*first*, an endorsement on the envelope of the will of 1801,—in these words, “Wm. Dredge’s will, dated Feb. 7, 1801.” The paper of this envelope is proved from the water mark to have been made in 1806.

This is only pleaded as a recognition; they do not venture to assert this, of itself, to be a republication. Now this endorsement is perfectly equivocal;—he had made two wills, one in Feb. 1801, the other in July 1803;—this only describes which of the two wills is contained in this envelope, and might be only to distinguish it from other papers. It would not have been inconsistent if he should have made a similar endorsement on the will of 1803.

It is asked why he should preserve this will, and put it in an envelope in 1806? It is not necessary that the Court should be able to answer this question;—wills are ambulatory till the death of the testator, —he had two by him,—he might preserve both, that in case Mrs. Stride should die, or in some other contingency, he might choose to revive this, and destroy or revoke the other, but he has not done it;—or it might be to deceive Mrs. Cooper, who was living in the house with him, if she should happen to get access to it, and induce a belief in her mind that she was to be the person benefited at his death.

The same observation applies to the next circumstance, viz. that he consulted with an attorney, Mr. Woodyear, whether this instrument

(*a*) If a man having made a former will, do make a later, which is more than a bare revocation; yet, if afterwards, lying upon his death-bed and speechless, both these wills be delivered into his hand, and he required to deliver to one of his friends about him that will which he would have to stand, and to keep in his hand the other, and he thereupon delivereth to the minister, or other his neighbours, the first made will, retaining in his hand the later, as was done in the time of Edward the Third; here the former will, though made void many years before by the later, is revived, and shall stand as the party’s will.—WENTWORTH’S *Office and Duty of Executors*, ch. 1. p. 25.

would be valid;—but there is no act of republication stated, and he merely took advice as to a particular point; and the evidence is open to the observation, either that the deceased deceived the witness intentionally, or that the witness must have deposed inaccurately; for the deceased must have known, at least the Court must presume that he knew, that it was not his last will;—he might have had some hesitation in his mind as to which will he should adhere to,—or he might have it in contemplation to set up the first will again, by some future act,—by destroying that of 1803, or upon some event or contingency,—he might also have his reasons for holding out false colours to Mr. Woodyear; at most he was only consulting Mr. Woodyear, and not intending a republication.

This is not sufficient to revoke a later will regularly executed, and attested.

The only remaining circumstance to be considered, is the affection of the deceased for Mrs. Cooper, and his declarations that she would be benefited by his death.

Now circumstances of this kind, though of some weight in an inquiry into the factum of a will, yet weigh nothing as amounting to the revocation of an uncanceled will, the factum of which cannot be impeached.

If, therefore, this evidence had been unopposed, it would have been insufficient to have revoked a later, and set up a former will;—but there is, on the other side, evidence of a recognition of the will of 1803,—of affection for Mrs. Stride,—of declarations in her favour,—and on the other hand, of disaffection towards Rebecca Cooper, and also of a wish that she should not know how he intended to dispose of his property, which does away the whole effect of the circumstances (in the absence of any formal act of republication) by which it has been attempted to set up the former and revoke the latter will.

On the whole, the will of 1803 is fully proved; its effect is to revoke the preceding will; and accordingly I pronounce for the will of 1803.

The costs being prayed against the party setting up the will of 1801.

Per Curiam. The parties have been misled by the conduct of the deceased; I shall give no costs.

HOLLWAY v. CLARKE.—p. 339.

Marriage and the birth of a child, presumptive revocation of a will made by a widower, and in favour of children of a former marriage.

JUDGMENT.

SIR JOHN NICHOLL.

Henry Clarke died on the 24th of November, 1810;—he made his will on the 15th of April, 1807, by which he gave his real and personal estates to his executors in trust to sell the whole, and after the payment of his debts, and funeral expenses, to apply the remainder to the maintenance and education of his son and two daughters; the whole then to be divided between them with survivorship; but if they all died before twenty-one, or without issue, he then bequeathed over his property to be divided between three cousins.

The deceased was a widower at the time this will was made. He afterwards married, viz. in June 1808, and had issue one child, who is now living. He received a marriage portion with his wife; but there was no settlement, or other provision, for her and her issue.

These facts are not controverted; there can be no doubt, therefore, that *prima facie* this will is revoked;—the law is so clear on this point, that it is unnecessary to discuss the history and progress of it; it is sufficient to state that it has been held in a series of cases for upwards of a century that marriage, and the birth of a child, operate as the presumptive revocation of a will; and upon this principle, that there has been such a complete alteration in the deceased's circumstances, such new obligations and duties have been contracted, that a departure of intention must be presumed. The particular circumstance of the deceased's having been a widower, does not seem to break in upon the principle;—the change of circumstances is the new obligation he has contracted by having a new wife, and a new issue. Indeed, several cases have occurred in this Court, in which this circumstance has been held to make no difference. In *Emerson v. Boville*(a), the testator was a widower, though the particular point made was, whether the subsequent death of the child born in the second marriage, did not set up the will again. The Court held that it did not,—though it was admitted that the presumption against the will would have been rebutted by circumstances, or declarations indicating an intention that the will should operate,—as was the case in *Thompson* formerly *Myall v. Sheppard and Duffield*, Prerog. Trinity Term, 1782; but there is no case in which the Court has held a revival from the circumstance of the death of either of the parties in whose favour the law had presumed a revocation.

A presumptive revocation may be repelled by circumstances; but then the circumstances to repel must be clear and unequivocal, and showing that the deceased adhered to, or revived, the will;—there must be some act,—or at least some declaration clearly referring (after the change of circumstances) to the will as an existing will, intended to operate.

In this case, it is stated, that the deceased left real property to the value of 13,000*l.*, and personal property to the amount of 12,000*l.*;—that he left specialty debts to the amount of 8,300*l.* and simple contract debts to the amount of nearly 14,000*l.* making together upwards of 22,000*l.*; so that unless the real estates are charged with the debts, there will be a deficiency of nearly 10,000*l.* in the payment of the debts; and, finally, that the wife will be provided for, by being entitled to her dower.

Now that circumstances of this description are to repel the presumption, I can find no precedent.

It must be shown by some act or declaration, that he considered the will as an operative will.

The insolvency of his personal estate would, at the utmost, leave the matter to mere conjecture;—he might not be aware of the state of his circumstances,—he might not have admitted all these demands,—he might not have considered them as urgent, or he might choose that his

(a) See the next case.

real estate should not be charged with them; there would be no end of such conjectures in respect to his intention.

The presumptive revocation arising from marriage and issue must be repelled by clear and unequivocal evidence of an intention that the will should operate. The Court, therefore, is of opinion that so far as respects the personalty, (over which alone this Court has jurisdiction,) the will is revoked, and that the deceased died intestate.

EMERSON v. BOVILLE.—p. 342.

Marriage and the birth of a child presumptive of revocation of the will of a widower made prior to a second marriage: and the death of the child does not alter that presumption.

JUDGMENT.

SIR WILLIAM WYNNE.

I take it to be established by an uniform course of decisions for above a century, that marriage, and the birth of a child by that marriage, creates a presumptive or implied revocation of a will;—but it is only a presumption grounded on the supposition that so complete a change having happened in the family of the deceased, raises the implication that he did not intend that his will should take effect. It may be rebutted, as was the case of *Thompson* formerly *Myall v. Sheppard and Duffield*, Prerog. Trinity Term, 1782; there a seaman made his will in favour of his children by a former wife;—he married again, and had one child, and a posthumous child. Many declarations proved that he did not believe the child, which was born in his lifetime, to have been begotten by him; and there were letters and declarations by which it was completely established that it was his intention that the will should not be revoked; and Dr. Calvert pronounced for the will.

But is there any instance in which there being nothing of this kind, without declarations, or circumstances, importing a permanence of intention, that the presumption has been held to be taken away merely by the death of the child? I think there is no such case, and the effect would be severe, were it to be so held.

For it being established law, that marriage and the birth of a child revokes;—here the wife has no provision.

Finding no case in which it has been held that the death of the child revives the will, I should have been unwilling to hold a doctrine so severe on the second wife, if this had been a new case;—but I find a case in point, that of *Sullivan v. Sullivan the attorney of Brooke*. Joseph Derwell made his will March 1771, giving an annuity of 100*l.* to his brother;—several legacies, and the residue to three children, two by his first wife,—and one by his second;—he was then a widower; the will was all in his own handwriting;—on the 8th of August, 1771, he married;—on the 1st of May, 1772, a child was born; on the 11th of the same month the child died; on the 20th of September, 1772, the testator died, leaving property to the value of 10,000*l.*;—probate of the will was prayed, which was opposed, and an administration was prayed to his effects as having died intestate;—two points were made:

1st, That the will was for the benefit of the former children; and it

was argued that in none of the cases decided, was the will in favour of children.

2dly, That the death of the child during the life of the testator, revived the will.

On these points, Sir George Hay said,

1st, That it was as much his duty to provide for a child by his subsequent marriage, as for his other children.

2dly, That he considered that the will would not revive, unless it were republished, or revived by some act. And administration was decreed.

On the authority of that case, and on principle, as I take it,—the death of the child does not revive the will;—but it requires some act, some recognition, or something to show the deceased's intention that it should take effect.

I think the will was revoked, and that it remains revoked.

BONE and NEWSAM v. RICHARD SPEAR.—p. 345.

An informal will established.

WILLIAM SPEAR, of Gray's Inn, an attorney at law, died on the 21st of July, 1811. John Bone and Christopher Newsam alleged themselves to be the executors named in the will of the deceased as contained in the following testamentary writings marked A. and B.

(A) *Heads of the Will of William Spear, of Gray's Inn, Gent.*

- " All my just debts, funeral and testamentary expenses to be
- " paid immediately after my death : to my uncle
- " John Spear five hundred pounds, to be paid within
- " 3 months after my death—by my executor;
- " To my brother Charles Spear five hundred pounds;
- " to my brother Richard Spear (a) one thousand 3 p. cents.
- " to be set apart in my name in trust (b)
- " consold. bank anns. [^] in trust for my nephew John Spear,
- " & my neice Spear, the interest & dividends to be
- sum
- " laid out in the funds. Same [^] to accumulate till the eldest
- one moiety of (c)
- " attains 21; then [^] to divide the principal & the accumulations
- " to be paid him, & the other moiety to remain till my
- " neice attains 21; then to be transferred to him; if either
- " die before 21, the survr. to have the whole at 21;
- " if both die under 21, to go to my executor;
- two (d)
- " To my brother-in-law John Bone one thousand 4 p. cents.
- ^
- " to be set apart in my name in the bank, in trust for the
- of my brother-in-law John Bone,
- " son & daughter [^] the same way as I have given the 1000
- " consols to my brother Richard's children.

(a) The words "to my brother Richard Spear," were struck through with a pen.

(b) The words "in trust," were struck through with a pen.

(c) The words "to divide," were struck through with a pen.

(d) The word "one," was struck through with a pen.

"To my sister-in-law Sophia Newsam the interest & dividends
 "of all my India stock, *in trust* apply the same
 "towards the education of her children, which I hope she will
 "faithfully do; and her receipt for such interest to be a
 "sufficient discharger notwithstanding her coverture.

any one (c)

"When *either* child attains 21, his other share of the stock

"to be transferred to him or her, according to the number
 "of children my sd. sister-in-law shall then have;
 "& so often as it shall happen that any one
 "child shall attain 21, a like transfer to be made.

the

"As to all ^A rest & residue of my money, stocks,
 "funds, securities, & also my chambers at No. 2,
 "Gray's Inn Square & all my other property

Mr.

in-law John Bone & ^A Christopher Newsam,

"I give the same to my brother ^A Charles Spear, (d)
 exors. (c)

"his ^A admors. & assigns, for his own use; (f) & I appoint
 "them (g) sole (h) to be executors.

"WM. SPEAR.

"Gray's Inn, 31 July, 1809, (i) 1810."
 The paper was endorsed "Intended Will."

B.

19th August, 1810.

Whole Property.	£.
2000 4 per cents - - - at 85	1700
1300 consols - - - — 68	884
60 per cents long ann. — 18	1080
1000 India stock - - - — 182	1820
Chambers - - - - - - -	800
Furniture about - - - - -	600
Sir Jno. Q. Johnston's bond - - - -	750
	<hr/> 7634
Partnership about - - - - -	1000
	<hr/> 8634

Disposed of by Will.	£.
2000 4 per cents - - - -	1700
1000 consols - - - -	680
1000 India stock - - - -	1820
Legacy to my uncle - - - -	500
Ditto to my brother Charles - -	500
	<hr/> 5200
	<hr/> 3434

- (c) The word "either," was struck out with a pen.
 (d) The words "Charles Spear," were struck through with a pen.
 (e) The word "his," was struck through with a pen.
 (f) The words "for his own use," were struck through with a pen.
 (g) The word "them" had been "him."
 (h) The word "sole," was struck through with a pen.
 (i) "1809," was struck through with a pen.

RICHARD SPEAR, one of the brothers of the deceased, entered a caveat, and opposed the validity of these testamentary schedules: and the executors gave in an allegation pleading,

1st. That the deceased being of sound mind, and desirous of settling his worldly affairs, wrote the paper A.; and, having approved thereof, on or about the 31st of July, 1809, or on the 31st of July, 1810, being the several dates appearing thereon, subscribed his name thereto.

2d. That the deceased being minded to make alterations in his will, as well in the dispositions thereof as also in the appointment of executors, with his own hand made the alterations afterwards pleaded; and having so done, on or about the 19th of August, 1810, he wrote the paper B., and therein described the particulars and the amount of the property he possessed, and specified the legacies given by paper A. to ascertain the total amount thereof, and thereby recognized and confirmed the several alterations made in paper A.; and that the deceased, by the alterations made in paper A., appointed John Bone and Christopher Newsam executors and residuary legatees.

3d. That the whole of the papers A. B., and the several interlineations and alterations therein, are of the handwriting of the deceased.

4th. That on Friday the 19th, and Saturday the 20th, of July, 1811, William Cardale, the partner and confidential friend of the deceased, visited him at his house at Holloway, by his the deceased's request, he being in an infirm state of bodily health, but of sound mind; and the said William Cardale, on both said occasions, then spoke to him on the subject of his will; that the said deceased, on such occasions, said he had written over the heads of his will, and signed it, and it would do very well; and upon the said William Cardale urging him to make his said will in a more formal manner, and offering his assistance therein, the deceased said he would do it, but repeated, that what he had already written would do very well, or to that effect; that about nine o'clock on the following morning, being Sunday, the 21st of June, Mr. Cardale again attended at the deceased's said house, in consequence of a message from John Bone, party in this cause, requesting him to come immediately, as the deceased had been taken suddenly ill; but on his arrival found that the deceased had died suddenly, a short time before his the said Mr. Cardale's arrival; that John Bone, and his wife Ann Bone, being then present, the said William Cardale thought it proper to seal up and secure the deceased's property, till his relations could be assembled; and, with the approbation of the said John and Ann Bone, he proceeded to seal up and secure the deceased's effects in his house; and on inquiry for the key of the chest in which the deceased deposited his plate, the deceased's woman servant said, that the same was usually kept in the drawer of a wardrobe which stood in his bed chamber; that the said William Cardale unlocked the said wardrobe; and upon unlocking also an internal drawer, the paper A. appeared lying at the top of other papers of moment and concern which were contained in the said drawer, the said paper A. being folded together, but not inclosed in any envelope or cover, or sealed, and the paper B. being folded therein; that the said William Cardale then proceeded to read over the said papers aloud to the said John and Ann Bone, and then observed the several obliterations, interlineations, and additions, now appearing therein; and the article concluded with pleading the plight and condition of the papers in the usual form.

JUDGMENT.

Sir JOHN NICHOLL.

William Spear, a solicitor, is the party deceased;—two papers are propounded as his will by the executors,—which are opposed by the next of kin.

The papers themselves are important; A. is superscribed as the “heads of the will of Wm. Spear, of Gray’s Inn;” the inference would be from this, that it was a paper from which it was intended that a more formal will should be drawn out;—it is dated and subscribed, and it contains a complete disposition; still, however, if it rested here, the Court must have considered it as imperfect, because it is described “heads of a will.” But alterations were made afterward in a formal manner, which look like an alteration in his intention as to this point; and there is a high probability that he intended this paper to have effect;—but the Court is not left to this conjecture.

Paper B. was written within a fortnight afterwards; this contains a calculation of the amount of his property, and then enumerates the several legacies, exactly in conformity with the will. And it is pleaded that, when the deceased was taken ill, he told his friend Mr. Cardale, “that he had written the heads of his will, and signed it, *and that it would do very well*;” that Mr. Cardale urged him to make it in a more formal manner. He said he would, but repeated, that which he had already written would do very well,—and he died unexpectedly the next morning before Mr. Cardale’s arrival.

If these facts shall be proved, as they are laid in this allegation, they will be decisive of the validity of this paper; they will establish continuance of intention, and non-execution caused by the interposition of death;—the paper was found not as a cast off memorandum, but carefully preserved.

The Court can have no doubt in admitting this allegation.(a)

(a) The cause came on for hearing on the 26th of February, 1812, when the allegation being proved by the evidence of Mr. Cardale, and two other witnesses, the Court pronounced for the validity of paper A., but rejected paper B.

From this sentence an appeal was interposed by Richard Spear, to the High Court of Delegates; and in the course of proceedings in that Court, Charles Spear, another brother of the deceased’s, intervened; and alleging himself to be the sole executor named in paper A., propounded that paper as it stood prior to the alterations made in the three last lines; he also gave in an allegation pleading that the alterations and interlineations in the three last lines were not made by the deceased, nor under his directions;—and that he always entertained a great aversion and contempt for Christopher Newsam.—On this allegation, fourteen witnesses were examined. The executors gave in a responsive plea contradicting these facts, on which they produced eighteen witnesses.

On February 15 and 17, 1816, the cause was argued at Serjeant’s Inn, before

Mr. Justice GRAHAM,

Mr. Justice BAYLEY,

Mr. Justice DALLAS,

Doctor ARNOLD,

Doctor ADAMS,

and

Doctor DONSON.

Dr. Swabey, Dr. Jenner, and Mr. Heald, were counsel for the executors;—Dr. Stoddart and Mr. Warren, for Richard Spear;—and Dr. Phillimore, Dr. Lushington, and Mr. Phillimore, for Charles Spear.

The Delegates established paper A., and condemned “Richard Spear in the costs occasioned to the Respondents by his appeal,—excluding therefrom any part of the costs which arose from the intervention of Charles Spear.” The gave no costs against Charles Spear.

TAPPENDEN v. WALSH.—p. 352.

A married woman can make a will of property left during coverture to her sole and separate use.

AN allegation was submitted to the Court, propounding a will dated Dec. 15, 1797, and a codicil dated Oct. 2, 1801, of Anne Thompson, widow;—both made during her coverture.

The property had devolved to her partly under the will of Anne Wilson, and partly under the will of Thomas Martin:—by the former instrument, the property had been left to trustees for her use, with a power to her of disposing of it “*by any writing purporting to be, and in the nature of, her last will and testament.*” By the will of Thomas Martin, a legacy had been bequeathed “*to her, and her heirs, executors, and administrators, and assigns, absolutely, and for ever to and for her and their own sole and separate use and benefit.*”

Adams and *Stoddart* opposed the admission of the allegation.

Swabey and *Jenner*, contra,

Cited *Ryley* and *Asberry v. Lawton*, Arches, 1791. *Bennet v. Davis*, 8d Peere Williams. *Rolfe v. Budder*, Bunbury. (a)

JUDGMENT.

SIR JOHN NICHOLL.

Two objections are taken to this allegation.

First, That Anne Thompson had no right to dispose of her property by will, for want of a power from her husband authorizing her to do so.

Secondly, That the codicil disposes of property not her own, as by the will of Thomas Martin, who bequeathed it to her, it was not left to trustees for her separate use.

By the law, as it stands at present, a married woman who possesses separate property, may dispose of it without the consent of her husband.

The probate of this Court does not decide upon the right of disposal, it decides merely on the factum of the instrument;—perhaps, if no probate were granted by this Court, the person to whom the property is left might be unable to recover it.

The general right of the wife, in this respect, has been established in a great variety of cases. In *Rees v. Rhodes*, Prerog. Trinity Term, 1799, a wife without any authority from the husband, disposed of separate property, over which she had controul.

In *Bowes v. Bowes*, Prerog. Hilary Term, 1801, this Court laid down that it would not look nicely into the power of the wife, as that right belonged to another Court;—in that case the Court granted a limited probate. *Richards v. Lea*, Michaelmas Term, 1805, is to the same effect.

(a) It stood singly on the point, whether from the circumstances she had such a separate property in the bond that she could dispose of it: and *per Curiam*, clearly she is not only executrix, but the bond is devised to *her sole and separate use*, which vests the interest in her in a Court of Equity, as much as if the son had vested it in trustees for her separate use; and there are many instances where a Court of Equity has decreed an husband to stand as a trustee for the separate use of his wife. Lady Suffolk's case, who married Serjeant Maynard; Sir Joseph Hern's wife; *Seymour v. Dilkes*, Nov. 17, 1718. See *Rolfe v. Budder*, Bunbury's Reports, p. 187.

In other Courts the same doctrine has been held. In *Fettyplace v. Gorges*, 9 Bro. C. C. 10, Lord Thurlow said, "*that where personal property was enjoyed separately by the wife, it must be enjoyed with all its incidents.*"

The Court will, therefore, grant probate without the consent of the husband, limited to the separate property of the wife.

The second objection is, that the codicil disposes of property not her own because it was not given to trustees for her separate use. It appears to me, however, that the will of Thomas Martin does convey the property to the separate use of Mrs. Thomson, independent of her husband.—If I am at all required to give an opinion as to this point, I apprehend that, under the words of this will, a Court of Equity, or any Court, would decide that she had a right to enjoy the property independently of her husband;—at all events, it is not necessary to decide this point; it is enough for this Court to grant its probate.

I have no difficulty in admitting the allegation;—nor shall I have any difficulty, if the facts are proved, in granting a limited probate.

ARCHES COURT OF CANTERBURY.

FAREMOUTH and Others v. WATSON.—p. 355.

(*An Appeal from the Consistory Court of Exeter.*)

A civil suit to annul an incestuous marriage brought by the sisters of the husband.

PREROGATIVE COURT OF CANTERBURY.

WOOD v. WOOD.—p. 357.

Part of a will established, and part held not to be entitled to probate.

JUDGMENT.

SIR JOHN NICHOLL.

James Wood is the party deceased; he died on the 29th of March, 1809, leaving Jane Wood his widow, and also a mother and brother, several sisters, and some nephews and nieces: he had real property to the value of about 20,000*l.* and personalty amounting to about 13,000*l.*

An unexecuted paper, being a paper of instructions marked A. and which refers to a will of the deceased's brother Jacob, has been propounded by the widow, as containing with that will so referred to the will of the deceased.

Another paper B. which was the draft of a will prepared from A., has been propounded at the hearing of the cause; and I am now prayed in the alternative to pronounce for A. and B., or for A. and the brother's will.

All these papers are opposed by the mother, and three other next of kin, who pray an intestacy.

The history of the papers, as given in the evidence, is to this effect:—the deceased was taken ill on Sunday, the 26th of March, 1809; he was rather better on the Monday; but on the Tuesday morning he grew worse. On that morning, *Amy White*, a maid servant, who is examined on behalf of the opposer, states,

“That about eight o’clock, the deceased expressed a wish that his solicitor, Mr. Edis, should be sent for, and asked the respondent to go for him; but she was prevented so doing by Mrs. Wood, the deceased’s wife; and soon afterwards the deceased asked her if she had been to Mr. Edis; and on her telling him she had not, he seemed quite angry, and desired her to tell Mr. Thomas to come up to him for that purpose, which she accordingly did.”

Mr. THOMAS, (who was clerk to the deceased,) states,

“That about eleven o’clock, he was desired by the deceased to go to Mr. Edis, his solicitor, and desire him to come and take instructions for his will. He accordingly went, but Mr. Edis was not at home; he left a message for him; Edis came shortly afterwards, in the forenoon, and he accompanied him up stairs into the deceased’s room.”

So that the whole originates with the deceased himself; the animus testandi is strongly marked, he is angry with the maid for not going to Edis. Mrs. Wood had no desire for a will, she prevents the maid from going,—the deceased then sends his clerk; so that the intention of making a will, and dying testate, is quite spontaneous, and is decided.

Mr. EDIS then takes up the account, “that, on entering the room, the deceased shook hands with him, and addressing him, said, ‘I want you to make my will.’ The deponent asked the deceased to give him instructions; pen, ink, and paper, were brought; the deceased gave instructions verbally, which he wrote down in the deceased’s presence;—that the deponent prepared the will of the deceased’s brother Jacob, who died about a year ago; the deceased was one of the acting executors, and well acquainted with the contents thereof; and being desirous of making his own will, in great measure, similar to the will of his late brother, he referred thereto by telling the deponent that he meant his wife to be left exactly as Mr. Jacob Wood’s wife was; and the deponent then wrote the same down in nearly the same words as dictated by the testator; the deceased then proceeded to dictate the rest of the instructions, and the deponent wrote the same in manner aforesaid, being the whole of the testamentary schedule A. except (besides something quite immaterial,) that he wrote the words ‘*if children; if none, to have estate and effects subject as hereunder;*’ subsequently to taking such instructions, as will be hereafter deposed;—that as he wrote each clause, he, as he recollects, read the same;—that the deceased was very ill, and the deponent was as concise as possible in taking the instructions: yet, he is certain they were exactly conformable to the deceased’s wishes, and met his approbation; that having completed them, he of his own accord said he would immediately go home and prepare the will, and then left the deceased; taking the instructions with him.”

Mr. THOMAS “well recollects the deceased mentioned his intention to make his will in great measure similar to that of his late brother Jacob, by saying that he meant his wife should be left exactly as his brother Jacob’s wife was, and that his mother should be left the same as in his brother’s will; that, as Mr. Edis wrote down the instructions, he read the same clause by clause to the deceased, who well understood

and approved thereof, to the best of the deponent's recollection ; Mr. Edis, when he had completed the instructions, read them all over to the deceased, who expressed his approbation thereof, and desired the will to be prepared as soon as possible."

Mr. Daws, who was an intimate friend of the deceased's, and joint-executor with him under his brother Jacob's will, states, "that being informed the deceased wanted to see him, he went into his room, and found Mr. Thomas and Mr. Edis with him;—Edis was writing; he was informed they were instructions for the deceased's will. Edis said the deceased had expressed himself very anxious that the deponent should be one of his executors; he asked the deceased if he wished him so to be; to which he replied, 'Yes, he did very much.' The deponent answered he would not hesitate, if he would let him know with whom he was to act. The deceased said he meant his wife to be one of the executors; after which some conversation ensued about the propriety of appointing a third, the deponent suggesting such propriety, and asked the deceased if he would have either of his relations appointed or not. The deceased decidedly answered, 'No.' Mr. Turner and his son were proposed,—the deceased stated his reasons for not adopting them, and at length, Mr. Ayton, Mr. Dawes's then partner, was fixed upon." Mr. Dawes adds, "that the deceased being at such time sitting up in bed, threw himself rather back on his pillow, and said, 'Now I am satisfied.' That the whole instructions were read over to the deponent in the deceased's presence and hearing; and he well remembers that it was intended by the deceased, that the will of his late brother Jacob should form the basis of his will, for the deponent well remembers that in such instructions, which were read over to the deceased as well as to the deponent, and were also looked over and read by the deponent, as Mr. Edis was writing, the latter part began with expressing that Mrs. Wood was to be left exactly as Mr. Jacob Wood's wife was, and that the deceased's mother was to be left similarly, as under Mr. Jacob Wood's will;—that he is quite certain the deceased perfectly well knew and understood the whole contents of the instructions; and that he, the deceased, did, in the deponent's presence, declare the same to be quite as he intended his will to be."

No evidence can more strongly, clearly, and uniformly, mark a fixed and decided testamentary intention, and more particularly the intention of leaving his wife exactly the same as his brother Jacob had left his wife.

The next of kin have given an allegation pleading incapacity arising from delirium the whole of this day.

They have examined four witnesses; the two apothecaries, neither of whom saw him till that evening.—

The maid servant, who says, "that he was free from delirium till the afternoon, about three o'clock." And

Dr. Meyer, who says, "that when he visited him in the morning, between eight and nine, or between nine and ten, he was in a state of strong delirium, (which renders it probable that his conversation with the maid servant, when he desired her to go for Mr. Edis, was at a later hour than she mentions,) but that between twelve and one, when he again visited the deceased, he found him free from delirium, quiet, and perfectly rational, and so far from being incapable of giving instructions

for his will, that he considered him fully capable, and he would not have hesitated becoming witness to a will at that time, had he been requested; that when he visited him on the same day in the evening, he found him in a high delirium, and he died next morning;—that when he visited him the second time about noon he saw some persons with him, but does not recollect who they were.”

The evidence then upon the opposer's own allegation, though it proves prior and subsequent delirium: yet, at the time of the transaction, it proves an entire absence of disorder, and perfect capacity.

The Court, indeed, has more satisfactory evidence than the opinion of any witnesses, viz. the conduct of the deceased himself, which leaves no doubt of his capacity.

The paper of instructions which was written, was to this effect.

“Mrs. Wood to be left exactly as Mr. Jacob Wood's wife was.

“Rings the same, except as below.

“My mother to be left similarly as she was under Jacob's will.

“My three sisters 50*l.* each.

Then some other little legacies and rings, and Ayton, Dawes, and Mrs. Wood, executors.

This paper then precisely corresponds with the parole account given by all the witnesses. The disposition in favour of the wife and mother is only intelligible by a reference to Mr. Jacob Wood's will, which, in substance, is to this effect:

“Mr. Jacob Wood gives his wife 400*l.* per annum, and the residue to his children, if the child which he has (having then one son,) or any other child, should live to the age of twenty-one; but if this son, and all other children, die before twenty-one, then the interest of the whole to the wife for life; and after her death, the reversion to his mother, brother, and other relations. The mother has a legacy of 120*l.* besides her reversionary interest in the residue.”

The intention of the brother seems to have been to give the wife 400*l.* per annum, if they had any child or children, and if none, (and at the time of making the will he had none,) the interest of the whole to her for her life; and after her death, the reversionary interest to his own family, to his mother, brother, and sisters.

The deceased was perfectly capable; it is strongly pleaded that he well knew the contents of his brother's will; he was the acting executor under it. Mr. Edis had drawn the will,—he must have perfectly understood his intention. Mr. Dawes also was executor under that will. The only possible doubt could be whether, as his brother's wife was de facto only receiving 400*l.* he having left a son, the deceased intended to give his wife only 400*l.* a year; or whether he intended to give the whole for life, (he having no child,) as his brother's wife would have in the event of her child dying. I should have thought clearly that he meant her to have an annuity of 400*l.* at all events, and a life interest in the whole, if there were no children; and then the whole to go to his mother and other relations; and such I think is the construction of the paper itself. The Court would have no room to entertain any judicial doubt as to the intention.

Suppose then the deceased had been struck with sudden death the moment these persons left his room;—here was the deceased himself, of his own accord sending for his solicitor to make his will,—in possession of full capacity,—dictating instructions,—these instructions reduced

into writing,—read over,—approved by him,—containing a full disposition of his property,—no doubt or hesitation of his intention,—his friends round him,—no supposition of any improper influence, and the solicitor carrying away the instructions to prepare a will as expeditiously as possible from them;—but before he could prepare the will the deceased became incapable by the act of God, and died the next morning. If the case had rested here, the Court could not, proceeding according to its ordinary rules, have hesitated in pronouncing for this paper.

The question then is, whether any thing happened afterwards, either to add to or to take from this paper; and the more clear, distinct, and deliberate, the intention was at this time, the more clear should be the proof of any subsequent alteration.

There is introduced into this paper of instructions a most important additional clause, in these words, “*if children; if none, to have all the estate and effects, subject as hereunder:*” these words were written by Mr. Edis, the solicitor; and it is admitted that they were not written till he was informed of the deceased’s death. Now no case has been furnished where an additional clause of bequest, written after the testator’s death, has been established. The Court would be very sorry to make the precedent, more especially under the circumstances of this case;—perhaps this alone would be sufficient for me to direct the whole clause to be struck out;—but as it may be necessary to examine the whole case, in order to see whether the former part of A. is in any degree affected; or whether B. which was written in the deceased’s lifetime, can be supported, the further evidence must be considered.—The effect of this clause, the substance of which is introduced into B. is to produce a very important change in the disposition;—the clause runs thus:—

“Mrs. Wood to be left exactly as Mr. Jacob’s wife was, if children; if none, to have all the estate and effects, subject as hereunder.”

What is the effect of this? Here is no child,—why that Mrs. Wood, instead of taking a life interest in the whole, takes the whole absolutely; instead of being left exactly as Mr. Jacob Wood’s wife was, or would have been if her child had died, she has an absolute interest instead of a life interest; the relations, and among others the mother, instead of having a reversionary interest in the residue, are wholly excluded, notwithstanding the mother is by this very paper expressly “*left similarly as she was under Jacob’s will;*” and all the witnesses saying the deceased perfectly understood and approved the paper, and declared it was exactly what he wished.

This most important alteration, made after the deceased had so deliberately given full instructions for his will, after he had marked a decided intention to make his brother Jacob’s will the basis of his own;—had directed his wife in part to be provided for as his brother Jacob’s wife;—had sent away the solicitor to prepare the will as expeditiously as possible;—the whole transacted in the presence of two confidential friends: I say this important alteration, if it had been reduced into writing in the deceased’s presence, and read to him, and standing upon the single testimony of one person, would have staggered and alarmed the Court; if not as to the correctness of the witness, at least as to the capacity of the deceased. Such a change of intention,—not a slight difference in the amount of the legacy, but in the very basis and leading principle of his will, would have called upon the Court to have examined very narrowly whether his full capacity continued; carefully, to have

ascertained whether he was fully understood by the witness, whether his capacity and intention had been fully proved, or whether there might not be some misapprehension between the witness and the deceased.—What then is the account given?

Mr. Thomas says, “that the deceased, previously to sending for Mr. Edis to make his will, told the deponent that he meant to leave all his property to Mrs. Wood, subject to such legacies as he should bequeath.”

When this declaration was made does not exactly appear, though I should understand the witness as meaning that the deceased said so at the time he sent for Edis;—but on a single loose declaration of this sort, the Court can never rely;—such a declaration is so liable to be misapprehended, so liable to be not exactly remembered, so liable to be loosely made without restriction, where only meant *sub modo*.

The deceased might so express himself, though meaning to leave the whole but “*for life only*;”—or the witness might not hear the limitation or restriction for life:—it is not corroborated by other declarations; there is no suggestion that it was the generally declared intention of the deceased to leave every thing to his wife, in exclusion of his other relations.—This conversation, then, spoken to by Thomas, affords very little proof of such an intention;—but if it was his idea then,—he had, when he set about the act, come to a complete determination to make the same division between his wife and his family that his brother Jacob had done,—to her the whole for life, as there were no children;—but then the property to revert to his own family.

Mr. Thomas goes on: “that, on going down stairs with Edis, he told him that if Mrs. Wood was to be left *exactly* as Mr. Jacob Wood’s wife, it would not correspond with what the deceased had, as aforesaid, previously told the deponent,—and he states that Edis then went to Mr. Dawes in his counting-house.”

Dawes says, “that after he had been a short time in his office, on coming down from the deceased, Edis came to him there; and the deponent having recollected that the circumstances of Jacob Wood’s will could not entirely form the basis of the deceased’s will, as the deceased had no child, and Jacob left a son; he mentioned the same to Edis, and as there might be a child, that a similar trust must be created for such child, as Jacob had created for his son; and he advised Edis accordingly to go up stairs to consult the deceased, which he did.”

Edis says, “that as he was going to prepare the will, seeing Mr. Dawes in his counting-house, he went in, and showed him the instructions; and some conversation was then started by Mr. Dawes, on the subject of the deceased’s having left this will the same as his brother Jacob’s wife, and the dissimilarity there was in their situations, Jacob having left a son; and suggested the propriety of providing for the deceased’s leaving issue, although he had none at that time; and thereupon the deponent, at the suggestion of Mr. Dawes, returned to the deceased, and asked whether, in the event of his leaving no child, he meant the residue of his property to go to his own relations, as his brother Jacob had directed by his will; to which the deceased replied as if he recoiled at the idea of leaving his property from his wife, if he should leave no child, ‘No, all to my wife;’ that having obtained no further instruction from the deceased, he again left him without having written down such further instructions.” He then says, that he went home and prepared the draft of a will B., which he carried to the deceased about five o’clock

in the evening; but he was then delirious,—that he died the next morning,—and being informed he was dead, he then wrote the additional clause, “if children,” &c. in the paper of instructions A.

This is the account of the addition to A. and the writing of B.; and it is contended, and prayed, that if that clause in A. (not being written till after the death,) cannot be pronounced for;—yet, that B. having been written in his lifetime, though not in his presence, nor even read to him, may be pronounced for, being conformable to such further instructions.

Upon the point of law, there certainly have been cases where a paper written in the lifetime of the testator, but neither reduced into writing in his presence, nor read over to him, has yet been established: but then they have been so established upon cases perfectly clear, both as to the intention of the deceased, conveyed by his instructions, and that the paper was exactly conformable to such clear and decided intentions. The Court has always acted with extreme caution in such cases; but such is the principle laid down in several within my own recollection. In *Bury v. Bury*, Prerog. Hilary Term, 1791; *Campbell v. Campbell*, Prerog. Michaelmas Term, 1797; *Wingrove v. Bye*, Prerog. Michaelmas Term, 1799; *Simpson and Davidson v. Temple*, Prerog. Trinity Term, 1801; *Hoare and Hayes v. Hayes*, Prerog. Hilary Term, 1807.

Is there then, in this case, such clear evidence of the intentions of the deceased, and of the accuracy of paper B. as the Court has always required?—There is much confusion between the witnesses.—According to Thomas, you would suppose that the suggestion originated with him, in consequence of what had previously passed between him and the deceased respecting the wife, and that Edis upon that went to Dawes to consult him what was to be done.

According to Edis,—he went to Dawes to show him the instructions; which was strange, as Dawes was present when they had been given in part, and had just heard them read.

According to Dawes, it was an idea started by himself, that there would be children; and he and Edis agreed that if children should be born, it would be proper that a trust should be raised for them, and that the deceased should be consulted upon that point; and in that Edis agrees. It seems rather extraordinary that they should have thought it necessary to have consulted the deceased upon that point; for surely the instructions already given implied it.—The deceased had already declared that his brother's will was to be the basis of his own; that his wife was to be provided for exactly as his brother's. How would Mr. Edis have drawn the will? After the legacies he would have given 400*l.* a year to the wife; he would have given the residue to the children, if any should be born; but in case of no issue, or the issue dying, then the residue to the wife for life; and then to the relations. To leave the wife exactly as the brother's—to provide for the contingency of children being born,—it wanted no further instructions for that purpose; and yet, both Edis and Dawes say that it was to consult the deceased on that point, and on that point only, that Edis again went to speak to deceased. But how does Mr. Edis state that he put the question? Not one word of providing for the children, if he should have any, and raising a trust for their benefit; but “whether, in the event of his having no child,—he meant the residue of his property to go to his

relations? Not whether in the event of having a child he would have a trust raised to provide for that child? How, going for the purpose of consulting the deceased upon the event of his having children, could he possibly have put this single question upon the event of his having no children, is not easily understood;—but if the question was thus put, how must the deceased have understood it? Why, the residue after the annuity of 400*l.* to the wife.—How was the case of the brother's wife? She left a son,—she had an annuity of 400*l.*, the residue was to provide for the son. The deceased, who was acting executor, well knew this; he then most naturally understood the question, “whether, if there was no child, the residue should go to the relations.” His answer is, “No, all to my wife.” That is, not only the 400*l.* a year, as my brother's wife has; but the interest for her life of the residue, in case we have no children,—as my brother's wife would have had in the same event.

Supposing the deceased's faculties had been ever so alert and alive, this was a very natural and probable misunderstanding, considering how explicit he had been, that he meant to do exactly the same for his wife that his brother had done; and also for his mother:—in any other understanding of the question, how could the deceased possibly have recoiled at the idea of leaving his property from his wife,—leaving the whole for life,—he must have understood it, the residue beyond 400*l.* a year.

But that upon this single question, and single answer, the Court is to take it, that the deceased had totally changed the whole plan and principle of his testamentary disposition, and that he meant now to exclude his own family altogether from any reversionary interest in his property, is quite impossible. The Court would require that his change of intention should be most distinctly ascertained by conversation and explanation, so that there could be no possibility of doubt of the deceased's meaning. The Court would also require that his capacity should have been fully proved, even if the question and answer were not liable to any misconception. The deceased had been strongly delirious a short time before;—he was again strongly delirious in a short time (within about two hours) after;—he had been fatigued by this transaction, by giving instructions for the will, and the discussion respecting the executors; he had thrown himself on his pillow, rather rejoicing that he was relieved when the business of the third executor to be appointed was arranged. He had been left some little time, since his friends had quitted the room,—he would naturally be in a dull torpid state,—not readily apprehending a single question, nor accurately ascertaining his own meaning by a single answer to that question. Under such circumstances, to pronounce for a paper not written in his presence, and never read over to him, would be going infinitely further than the Court has ever done, or than it can ever safely do.

In addition to this, what is paper B.? Why it contains a direction beneficial to the widow; that she shall at all events, even if there were children, have all the dividends for the first year;—a bequest not warranted by the brother's will, nor by any directions suggested to have been given by the deceased himself. It is said, this bequest is inoperative; so it may be by events;—but how can the Court rely in any degree on the accuracy of such a paper? This bequest, and the disposition of the residue absolutely to the wife, would both be introduced with less caution, as Mr. Edis expected that the whole would undergo the

revision of the deceased, and that would make him less careful on this second interview to explain the matter more fully, and exactly, or to write down this important alteration, and read it over to the deceased, and take care that he fully understood the nature of this change.

The Court, therefore, has not the least doubt or hesitation in rejecting paper B.;—but in respect to A. I shall strike out the clause written since the deceased's death.—With the exception of that clause the paper is fully proved to have been dictated by the deceased,—read over and approved by him,—and by referring to the will of the brother to contain the testamentary intentions of the deceased.—Nothing which passed afterwards has satisfied me that the deceased in any degree departed from or altered those intentions.

I pronounce for A. together with the will of Jacob Wood therein referred to, as together containing the will of the deceased, the words of the clause in A. being first struck out.

The Judge accordingly struck out with his own hand, the following words in paper A., *“if children; if none, to leave all estate and effects subject as hereunder.”*

PREROGATIVE COURT OF CANTERBURY. 360.47

MOORE and METCALF v. DE LA TORRE v. MOORE.—p. 375.

A mutilation of a will held to amount to a cancellation, and that cancellation not to revive a prior will of nearly similar import.

CATHERINE MOORE died August 16, 1813, possessed of a personal estate amounting to about 30,000*l.*; she left three sons, Thomas, George, and Peter; Peter was a lunatic.

The following testamentary papers were found at her death.

(A.) “In the Name of the Father, and of the Son, and of the Holy Ghost. Amen.

“I, CATHERINE DE KILLIKELLY and MOORE, Widow to the late George Moore, of Ashbrook, and Moore Hall, Esq. declare, before my God and man, my last Will and Testament, under my hand and seal, in my perfect senses and good health, that if the Almighty pleases to call me to himself, on the road going to Ireland, or any where else, or by some other unforeseen accident, as we are all mortal, leave every thing I possess in Spain, England, Ireland, or any other part of the world, as property, lands, houses, money, jewels, plate, linen, and every kind of houseal furniture of every description, between my son Thomas Moore, and my son Peter Moore, if the latter gets back his senses again; in case it is not God's will this should happen to him, pray his Br. Thomas Moore, to do by him as it would be most comfortable to be done to himself, if himself was the person inflicted by the divine hand. I name my son Thomas Moore sole executor of all I have, or will have, or possess. In my husband's will, made in Alicant the year 94, is expressed, that if any of my sons disobeyed me in any respect, I might give his share to any other of his

sons, as I pleased or thought proper. I now exclude and disinheirite my eldest son, George Moore, (possessing all his father's lands in Ireland,) him and all his heirs for ever and ever, to have the least claim or title to any thing belonging to me; as likewise, any thing that his father left to my disposal upon no pretext whatever, for his ungratefulness, undutifulness, and disrespect to me, the best and fondest of mothers to him more than any of her other sons, that brought John and Tom to be jealous of me on his account, when he got the last sum out of my power, as only executrice, gives himself away for life, into a family that he knows in his heart were the means of his father's and brother's most miserable and untimely death; who the meanest and most ill-natured of sons, his recompence to me for all my sincere affection and tenderness I had ever for him in particular is to conclude his ruin, without even letting me know one word, neither ask my advice, or wait for my answer, which he ought to have done, after so often protesting to me he would rather *die* than once offend me, and that he was coming over to Spain, who can believe such a person. I declare before God, who is the Searcher of hearts, that he has deceived me more than I can have words to express, therefore in my turn must renounce him to be my son, and errace him as much as possible out of my memory, till my latest breath; I leave my Br. Mr. Bryan Paul de Killikelly, one 100 pounds; my Sr. Fanny at Rouen in France, one 100 *pounds*, a year while she lives to pray for me; to my niece O'Neill de Arlox, fifty pounds a year while she lives, or for life; to Micaela Perez, for her good services, a piset a day for life; to my two nieces in Lisbon, fifty pounds each; to the nun Miss Moroney in Paris, twenty pounds to pray for me; to Doloxes my grand niece, daughter to O'Neill de Arlox, fifty pounds to pray for me; to my nephew, Mr. Arthur, twenty pounds to pray for me; if please God I die in Ireland, I desire my son Thomas to have *me* carried to Galway, to be buried in the Convent of Fryar's, of St. Dominick, near the place where my uncle, bishop Killikelly lays, as I should never consent to leave my bones on any spot belonging to my once dearly beloved son. I desire my son Thomas to have my funeral as simple as possible, no ostentation, but corresponding to me. I leave two thousand masses to be said for me from the day of my death, as fast as they clergy can say them, looking out for the best and poorest livers, at 6 reals each mass; three high mass's, and the whole office, to be said before I am laid under ground; 20 pounds to be given to the poor the day of my burial; to Micaela Antonio, and Visenta, mourning, and an ounce each; to Marg^{ua}. the French maid, her wages to be paid, her mourning, and an ounce besides, to Tomasas Sⁿ. and nephew an ounce each: my nurse's son in Bilboa. two ounces my son Tom's nurse, and ounce Augⁿ. mourning, and an ounce of the 14 in Mr. Moore will to be portioned I only paid three of them, they must be paid by my son Tom, if I don't live to do it; of the two thousand mass's I leave to be said for the repose of my soul, 200 of them must be offered in the Capuch *in* convent, in Alicant, where my dear Aunt is buried, and fifty in each church, and and convent in Alicant likewise for me; all my best silk cloaths to be cut up and made into vestments, for the altar; all my other cloaths and linen to be divided between my Sr. Fanny and my niece Helen O'Neill; what they don't like of them I leave to Micaela, and the other good servants that shall attend me in

my last sickness, paying them well besides; to my confessor 10 guineas to pray for me ; let him and the other clergyman who says mass for me and assist at my funeral, be payed as they ought to be. I leave a guinea to the woman who will dress my corps; if I die in London, I order my body to be buried at St. Pancras; the 9th and 30th day after my decease, to be said each day 33 masses if possible, they can do it; in case the Court of Spain dos not continue to pay the Spanish chapel here, I will take it for my Acc^t to pay the clergy, the four now in it, 4 women, and the porter, besides the boy's school, and must get one for thirty-three girls at my expence. I have money here in the funds, besides six thousand dollars for this purpos, in my trunks in Spain. I have a small annuity here of twenty guineas a year, in peaceable time, this sum I leave for ever and ever to have masses said for the repose of my soul particularly, must be offered by clergy without reprove from heaven. I leave Micaela and Marg^{ta}, the bed and bedstead they lay on in my house in Alicant, with two pair of sheets each, and to Micaela 3 table-cloths, and 11 napkins with blue strips, I had three French ones; to my niece Helen O'Neill, 4 pair of my own sheets 4 middleing table-cloths, 2 dozen napkins, 1 dozen fringed towels, 1 dozen coarse new cloths, that she should pray for me; Mrs. Atby one hundred pounds. I thank God I have no debts to pay, but forgive my Br what he owes me. I better my son Thomas in every thing which the laws of Spain permits, provided he don't marry like his Br Geo. into a family he knows I dislike, my niece de Arlox, will tell him one of them. George married without ever leting me know one word of his match, neither asked my advice, nor waited for my consent; for this reason exclude him for ever and ever, to claim any inheritance from me, nor do I wish ever to see him while I live, nor any body belonging to him, for carring my grey hairs to the grave with sorrow. I leave Pedro Perez, mourning; and an once to Maria, the old woman, that come to diner for charity, half an onze to pray for me; to her son, the Capuchin Fryar, half an onze to say forty masses in my intention at a pisset. I leave all my power to my son Thomas, in regard to any property belonging to his Br Peter to manage it for him, till please God he gets back his five senses, excluding his Br. George to have any thing to say to him, except to give up by my commands the fortune his fater left him in the Irish Will, being a better Br. and dutiful son; and do declare, that George did not follow my advice about geting him back his senses, and for so doing I shall never forgive myself to have sent him from Spain, to be tutered by such an unworthy son as George has proved to me by his undutiful actions. My blessing to my two sons Thomas and Peter, may heaven shower upon them both every blessing, to be good and dutiful to the fondest and best of mothers.

"I sign with my own hand and seal

"CATHERINE DE KILLIKELLY and MOORE. (L. S.)

"London, 29th May, 1808."

B.

(The black lines are to show in what manner the original paper was found cut.)

“ In the name of God, Amen.—I, Catherine Moore,
 “ late of Alicant, in the kingdom of Spain, but now of
 “ Wimpole-street, in the parish of St. Mary-le-bone, in
 “ the county of Middlesex, in the kingdom of En-
 “ gland, widow, do make and publish this my last will
 “ and testament, in manner following, (that is to say)
 “ I will and desire that my dear son, Thomas Moore,
 “ shall and do, as soon as conveniently may be after my
 “ decease, procure my remains to be decently and care-
 “ fully deposited in some appropriate place in England,
 “ until a convenient opportunity shall by him be obtain-
 “ ed for safely conveying my remains by sea to Spain;
 “ and when such opportunity and conveyance shall have
 “ been so found and obtained by him, then I will and
 “ direct that my said son, Thomas Moore, do and shall
 “ cause and procure my remains to be decently and care-
 “ fully conveyed to the city of Alicant, in the kingdom
 “ of Spain aforesaid, and afterwards that he shall pro-
 “ cure them to be interred in my own vault in the Capu-
 “ chin church, outside the said city. I also will and direct
 “ that all my just debts, funeral expenses, and the charge
 “ of the probate of this my will, be paid out of my per-
 “ sonal estate by my said son, Thomas Moore, my ex-
 “ ecutor, and charged and chargeable with the payment
 “ thereof. I devise, give, and bequeath all my lands,
 “ tenements, and hereditaments, whether in freehold or
 “ copyhold, and also all and singular my personal estate,
 “ goods, chattels, household furniture, plate, books,
 “ wearing apparel, stock in the public funds, ready mo-
 “ ney, bonds, mortgages, notes of hand, and all other
 “ securities for money, rent, arrears of rent, interest of
 “ monies, debts due and owing to me, and all other my
 “ estate and effects, of what nature and kind soever,
 “ and wheresoever situate, whether it be in Spain afore-
 “ said, or in England, Ireland, or elsewhere, that I shall
 “ be seized or possessed of, interested in, or entitled to
 “ at the time of my decease, unto my said dear son,
 “ Thomas Moore, to have and to hold the same, and
 “ every part thereof, unto him the said Thomas Moore,
 “ his heirs, executors, administrators, and assigns, for
 “ ever, or according to the nature and quality thereof,
 “ and to be by him, my said son, Thomas Moore,
 “ peaceably and quietly held, occupied, and enjoyed for
 “ ever, free from the claim or demand of any other per-
 “ son or persons whomsoever, and only subject to the
 “ payment of my debts, funeral and testamentary ex-
 “ penses as aforesaid: and further, to be subject to such
 “ legacies (if any) which I may hereafter bequeath by

"any codicil or codicils to be added to this my will.
 "And, lastly, I do hereby nominate, constitute, and
 "appoint my son, Thomas Moore, sole executor of this
 "my last will and testament; and I do hereby revoke
 "and make void all former and other wills by me at any
 "time heretofore made, and do declare this only to be
 "my last will and testament. In witness whereof I, the
 "said Catherine Moore, the testatrix, have, at the bot-
 "tom of the first sheet of this my will, (the whole
 "whereof is contained in two sheets of paper,) subscrib-
 "ed my name, and to this second sheet, my hand and
 "seal, this thirteenth day of December, in the year of
 "our Lord one thousand eight hundred and ten.

"Signed, sealed, published, and de-
 "clared by the above named Cathe-
 "rine Moore, the testatrix, as and
 "for her last will and testament, in
 "the presence of us, who, at her } C. MOORE. (Seal)
 "request, and in her presence, and
 "in the presence of each other,
 "have subscribed our names as
 "witnesses thereto,

" *Eleanora Archdeacon,* } East Street,
 " *Edw^d Archdeacon,* } Manchester
 " *P. Archdeacon,* } Square.

C.

(a) London, the 6th August, 1812.

"In the name of God, Amen.—I, Catherine Moore, widow of
 the late George Moore, of Ashbrook, and Moore Hall, Esq. in the
 county of Mayo, in Ireland, make my last will and testament, in my
 perfect senses and good health, not knowing how soon, neither the
 hour or instant, that the Almighty God should call me to himself out
 of this world. I wish and desire my will should be made in the
 following manner by a lawyer approved of; I bequeath my son Peter
 Moore while he lives unsain, three hund^d pounds a year, that
 he should be well taken care of, and have what may be comfortable
 to him in his present state, but if God pleases to give him back his
 five senses whatever I bequeath must be divided in three equal parts,
 and give him one of the 3 parts, but then as to the three hundred
 pounds a year, I bequeath that to him besides for ever and ever, to
 him and his exors heirs lawfully begoten, as he was, to me the only
 obedient and more dutiful to me than my two mentioned sons; I be-
 queath to my sister Fanny de Killilly, now at Rouen, fifty pounds a
 year while she lives, and at her death to fifty pounds more to pay her
 funeral expenses. I beques my Br. B.: P.: Lynch de Killikelly now
 at Bilboa, one *two* hundred pounds, and forgive him the 9000 R^s. he
 owes me. I all my juels, plate, linen of all kinds, with *all* my silk
 cloathes: furniture of this *house*, must be sold for as much as can be
 got for it, not to sell it in a hurry. I leave it in charitable *uses*, but

(a) There were many erasures and interlineations in this paper.

hope to live to sell it myself be I desire, and give away my carpit, which my aunt gave me with the sofa, and 12 armed chairs to a friend which I don't name, as it is my will and pleasure so to do; this house, without the furniture, I leave to my niece Helen O'Neill for ever, and after her to her daughter Doloxes, if she proves dutiful to her mother, otherwise she may disinherit her, they must never sell it, but must go to one of her sons who shall be most dutiful to her. I leave my two nieces in Lisbon, Mrs. Cusin and Mrs. Cloughan x one hundred pounds each for once, and my niece in Paris, the nun, Helen Moroney 50 pounds once; to Micaela Perez, I leave her 3 reals plate every day while she lives, with mourning for her, and if I have any *other woman* in Clara Ramiro, to pay their wages till the day of my death, and give them *mourning*; to blind Pira 2 reals a day while he lives. I pray that my corps should be buried with my dear aunt, at *the* Capuchins in Alicant, in the vault I got made there myself. If they won't permit I should be buried there, I desire, at my own expens, to be sent in a decent manner to Galway, in Ireland, and be buried near the place my uncle Peter, the bishop, lies, in the chapel of the Dominican friars. In case I shall be buried *there*, bequeath them two hundred pounds for my funeral expenses, and charitable uses. To my faithful serv^t Tomasa Cloreas Sⁿ 20 dollars *once*. To her son twenty more *once*. To Tom's nurse 30 dollars once current dollars, and desire my son Thomas to sell every thing that belongs to me in Spain, or any where else, with all *my acc^{ts}*, and give them up clearly and justly to my executors; that they should dispose of every thing that belongs to me as I shall desire or put in writing. As to the lease of this house, I shall dispose of it myself; that my will should be valid in Spain; leave one guinea to the holy house of "Jerusalem." I annull every other will I have wrote myself, or got wrote by any other person, except this one of this date, which I now write with my own hand,

"I name as my two executors,
Dⁿ Manuel de la Torre,
Father, & Mr. Frans
Archdekin,

CATHERINE MOORE.

"I bequeath my son Peter all I have to leave in this world, for his being to me an obedient and dutiful son, till he became unsain; and as it is God's he should be so, leave him all I my pro-
perty, that he should be taken better *taken* care of, and live more comfortably; but if he dies without coming to his five senses, and even if he only gets them at his death, I desire my executors to appropriate all my property I left my son Peter, to be laid out in charitable uses, as

This paper was endorsed
"Mrs. Moore,
of Alicant.
Last Will."

Besides these there was the draft of a will dated Dec. 1810, by which the deceased bequeathed all her property to Thomas Moore, and the following form of a codicil:

E.

The lines round this paper are to show in what manner the original was found cut.

Form of a Codicil to the Will (if such be intended.)

“ Whereas by my will hereunto annexed, bearing date
 “ the day of December, 1810, I thereby give, de-
 “ vised, and bequeathed unto my dear son Thomas
 “ Moore, all my real and personal estate, of which I should
 “ die seised, possessed of, interested in, or entitled to,
 “ subject only to the payment of my debts, funeral, and
 “ testamentary expenses, and such legacies as I might
 “ bequeath by any codicil to be added to my said will.
 “ Now I do hereby further bequeath unto [here name
 “ the nature and amount of the further bequests, and
 “ the exact descriptions of the persons to whom such
 “ legacies are bequeathed.] And I do hereby declare
 “ and direct that all the said legacies bequeathed in and
 “ by this codicil to my said will, are and shall be ac-
 “ counted and are charged upon all my estate and effects
 “ so devised and bequeathed to my said son Thomas
 “ Moore as aforesaid; and that the same are to be paid
 “ by him out of my estate and effects, within
 “ after my decease. And I do ordain and declare this
 “ present writing to be a codicil to my said will an-
 “ nexed hereto; and that it shall be taken and accepted
 “ as part thereof; and I do hereby confirm my said will
 “ in every particular thereof, that is not hereby altered.
 “ In witness whereof, I have to this codicil set my hand
 “ and seal, the day of 18

Signed, sealed, declared, and pub-
 lished by the said Catherine
 Moore, as and for a codicil to
 be annexed to her last will, and
 to be taken as part thereof, in
 the presence of

(Endorsed)

Copy for a Codicil.

Paper C. was propounded by Mr. Metcalf, the committee of Peter Moore.—Paper B. by Thomas Moore, who also, in the event of B. being pronounced to be cancelled, propounded paper A.—George Moore prayed an intestacy.

Mr. EDWARD DARELL *deposed,*

“ That he was at school with Thomas Moore, with whom a correspon-
 dence and intimacy were kept up, which led to his becoming, in the
 year 1809, acquainted with his mother; and that she often sent to him
 to talk with her; and he continued to be acquainted with her till two or
 three months next before her death, by which means, as well as by de-
 clarations of deceased, as long as he was acquainted with her, he knows
 that she entertained a very particular regard and affection for Thomas

Moore, and she spoke to deponent as having made him her heir entirely of every thing, but with a qualification, as it appeared to him, from what she said, that she expected her said son would be submissive to her; and she repeatedly spoke of his elder brother being possessed of an ample fortune, by succeeding to his family estates in Ireland, on his father's death, and of her being offended with him very highly; and likewise speaking of her other son, Peter Moore, becoming deranged, she said all her hopes were in her son Thomas; and she entrusted him with the management of her pecuniary concerns.

“That from his earliest acquaintance with Mrs. Moore, and as long as he was acquainted with her, she constantly expressed herself as highly displeased with and offended at her eldest son, George Moore; and assigned as reasons for such displeasure, his not paying her her jointure, and his marriage; and the deponent engaged himself in or about the month of April or May, of the year in which she died, in endeavouring to effect a reconciliation between her, and her said eldest son; but he was unable to prevail with her on such occasion, and she was not reconciled to him as long as he knew her; and till deponent so last knew her she, the said deceased, in his hearing, made use always of the most forcible expressions, purporting to and expressing her displeasure against him, and accusing him of ingratitude, and various acts of baseness, and declaring that she did not, and never could again look upon or consider him as her son, and that he should never be benefited by any property she might leave behind her.

The same witness answered in reply to an interrogatory,

“That the deceased did, about the period of her said son Thomas going to Spain, in the summer of 1812, as well as afterwards, mention to the respondent her disapprobation of his intermarrying with his present wife, as not being a proper match for him: but the respondent did not see or hear from her after the said marriage took place; and he knows not, nor has heard, nor has ground whereon to believe, that the deceased was, and uniformly declared herself to be, greatly exasperated and offended with him on that account, and that she never forgave him, or would ever permit his wife or her children, by her two former marriages, to see or visit her; save that, previous to the said marriage, she, the deceased, made declarations to the respondent, that such would be the case, when she talked to him to induce him to discourage her son from the said marriage.”

Mr. THOMAS LOWTEN, an attorney at law, *deposed*,

“That he was several times in company with the deceased, and her son, the articulate Thomas Moore, and until some months before her death, and on such occasions, as well as when absent from her, she appeared to have, and by her expressions of him, as he verily believes, had, a very particular regard and affection for him, and until about a month before her death, she appeared to him to look upon, and did, as he verily believes, look upon him as the special and peculiar object of her testamentary bounty; and she several times, in his hearing, spoke of her having made, and told him she had made, her said son her sole heir, and left him every thing; and she dwelt much upon her elder son George having got all the family estates in Ireland, as well as the personal property, which she said she had given him power to collect, but he had not paid her her dower, or the legacies given to his brothers by his father's will, and she said he became possessed of considerable pro-

perty by the death of his eldest brother, John; and mentioned her other son, Peter, as becoming deranged in mind, and very often spoke of her being greatly offended with the said George Moor.—That, by his acquaintance and intercourse with the said deceased, who used constantly to send her said son, Thomas Moore, to him, he knows that she entrusted her son Thomas Moore with the care and management of her pecuniary concerns, and he believes that he had the management of every thing, as she appeared not to do any thing without him; and she did, until about a month before her death, on various occasions, in his hearing, declare and express her regard and affection for the said Thomas Moore, and her full confidence in him, and she said to him, as late as in July next preceding the month of August, in which she died, that she had made him her heir; that she did, within the last month of her life, when he was in company with her, say, when speaking of the said Thomas Moore, who was in Spain, that she was surprised she could not hear from him respecting her affairs, after which, within the same month, in a letter in her handwriting, addressed to deponent (the said Thomas Moore having arrived from Spain, and being in London, where he had seen him) she desired him, after what had passed in Spain, not to consult her said son about her affairs; and in conversation she afterwards told him she had heard her said son had been deranged in his mind in Spain, (which he apprehends was what she alluded to, in saying, after what had passed in Spain) and the deponent remonstrated with her on the impropriety of such her determination, and said how much she would be assisted by him in giving her answer to a bill in Chancery, filed against her by his brother George; and she at last consented that the deponent should advise with Thomas Moore, about preparing such answer; but requested he would not let him know that she had desired him so to do; that he remembers (but whether within the last month of her life, or not, he cannot say) when she appeared dissatisfied with the said Thomas Moore, and (being the last occasion of her speaking of him) in an odd sort of way shrugged up her shoulders, and said, ‘I had’ or ‘I have’ (he cannot say which) given him every thing.”

Mr. ANTHONY GOWER *deposed*,

“That he had known the deceased nearly forty years.—That shortly before, and thinks it may have been as late as a month next before the death of the said deceased, who was in the habit of frequently calling upon him, that he last saw and was in company with her; and she, the said deceased, constantly appeared to have, and as he verily believes had, and entertained a great regard and affection for her son, the articulate Thomas Moore, to which he is enabled to depose from the expressions she always, in his hearing, used towards him; that she did many times say, that she doated on the said Thomas Moore, and that she had made him her heir; but she did sometime before her death tell him, that she suspected Thomas was going to marry; and within the last six weeks of her life, but more particularly as to time he cannot depose, she told him he was married, which appeared to displease her; that in speaking of this she said her said son, whom she doated upon, and whom she had made her heir, was married, with which she appeared to be, and was dissatisfied.”

Mr. DANIEL FRENCH, barrister at law, *deposed*,

“That he was, on several occasions, in company with Mrs. Moore, until the day next before the day on which she died; that, on the first

occasion of sending for him, she signified to him that her said son was going to take some step displeasing to her; but whether it was his departure for Spain, or what it was, he, to whom she particularly mentioned such, cannot now from recollection set forth; and she did, as he well remembers, then say, speaking of her said son Thomas, that he was the only person for whom she had any love; and that she had made a will in his favour, regularly signed and attested, and left the whole to him, and desired deponent to mention to him what it was that so displeased her, which he was going to do and which deponent did mention to him, though he now forgets what it was; and this deponent says, that at all times that he was in company with her, and down to the time of his last seeing her, she appeared to have, and as he verily believes had, and entertained a very particular regard and affection for her son, Thomas Moore; and she constantly to the deponent expressed and spoke of him as the peculiar object of her testamentary bounty; and during the latter part of his acquaintance with her, when she became displeased with him, said and declared to the deponent that her son, Thomas, was still the object of her bounty, though he had so much displeased her; and she did latterly frequently, when he was in company with her, request him to call on Mr. Butler, the conveyancer, and desire him to call upon her to make a new will, and which she so did about a month before her death; and on the last day next before her death, when he was coming from her house, the Reverend Mr. Garey, a priest, who attended her at the street door, told him Mrs. Moore wished him to go to Mr. Butler, and desire him to call upon her. That, until her said son Thomas went to Spain, the deceased entrusted him with the care and management of her pecuniary concerns, and all other business of importance; and that when he went to Spain, which he did about a year before her death, she entrusted him with her affairs there; that about a month before her death she wrote a letter, in which she desired deponent to meet her son Thomas, at Yarmouth, on his return from Spain, (where he had been, as he understood, in conversation with her, deranged in his mind) and accompany him to London; and soon afterwards, but before he so went to meet him at Yarmouth, she told the deponent she should always be afraid of his losing his mind again, and that he should only live in her house, provided the deponent would live with him; that the deceased, on various occasions, and at different times, declared and expressed her regard and affection for, and full confidence in, the said Thomas Moore, to whom she had, as by him predeposed, said she had left every thing; and so declared and expressed herself until she spoke as she did to deponent, some weeks before her death, about her son Thomas having become deranged in his mind in Spain, on which her affections appeared alienated from her said son Thomas; and when she spoke of his being deranged, he was in Spain; after which time, within two or three weeks next before her death, she several times said and declared to the deponent, that she would make a will in such a way as if she had no sons; and spoke occasionally against both her sons, Thomas Moore and George Moore, with great acrimony. That he has frequently heard her express her displeasure against George Moore in the most pointed terms, and declared that she did not nor never could again look upon him as her son, and that neither he nor his sons should be benefitted by any property she might leave behind her.

“That several times in the course of the year in which she died, she told him she had made Thomas her heir, and left him every thing; that one day, shortly before her death, she called on the deponent, and he went into the carriage to her, when she said, ‘*Now I consider that I have no sons or relations, and shall make other friends;*’ and a few days afterwards she repeated what she had said on the preceding day, and requested deponent to call on Mr. Butler, the conveyancer, in order to have a new will, saying, she felt herself very ill, and might probably die; on which he, from what she said, expressed his horror at the idea of her bequeathing her property away from her family; and saying that no good man would suffer himself to be benefitted by her bounty at their expence, she replied, she was determined to act as she thought proper; and finding her inflexible, he said to her, at all events, in case Mr. Butler should not come, I hope you will do nothing that will in the mean time disinherit your family, and leave your property in a state of eternal litigation; to which the said deceased answered, no, no, I have taken great care of that matter, though, God forgive me, this morning I very near did something that would have made Tom remember, (or suffer, he cannot say which,) but if I die before I see Mr. Butler, which I think from my pain in my side I may very probably do, there is a will, by which the property will not go out of the family; but really poor Tom is quite mad, and you must live here with him, and we must have at dinner knives that will not cut; and the deponent from thence was perfectly convinced, that until the hour of her death, she considered her son Thomas Moore as the object of her bounty by will; but otherwise he cannot depose to her recognizing any will by her made; that on all occasions, when she inveighed most bitterly against her son Thomas, she uniformly relented towards the end, and gave him to understand that he was still the fondest object of her affections;—that when she heard of Thomas’s marriage, she did once or twice declare that her son George’s was highly advantageous over Thomas’s.”

Mrs. Rooke *deposed*,

“That the deceased had the greatest aversion to her son Thomas’s marriage; and she has heard her say, that neither George nor Thomas should be benefitted by any property she might leave behind her.”

Mr. Thomas Moore, in his answer to the allegation given in by the committee of Peter Moore, *deposed*,

“That the deceased had a small flat deal box, and a small trunk in her bed-room, in both of which she kept her money, keys, papers, memoranda, letters, and other things; and that, after her death, the papers marked C. and B. were found by Mr. Lowten in the presence of Edward Darrell, Daniel French, and the respondent, together in the said deal box; and the paper marked A. was found in the said small trunk.”

Swabey and Stoddart, for paper C.

Jenner and Lushington, for paper B. or paper A.

Phillimore and Dodson, for an intestacy.

JUDGMENT (a).

Sir JOHN NICHOLL.

In December 1808, the deceased wrote a sort of temporary will;—for it was clearly made with a view to a more formal instrument. It

(a) This judgment has been given rather in a compressed form as so much of the evidence has been detailed. For the arguments of counsel, see the next case.

is merely signed,—not attested,—and from expressions which occur in it, must have been written with the intention of its being the preparation of a more formal will;—strong terms are used in it;—and it is written under feelings of great resentment, and for a temporary purpose.

Mrs. Moore's testamentary intentions were carried into more formal effect by the will of 1810;—in that will every thing is given to her son Thomas;—but she forbears to record the reproachful terms against her eldest son, which she had inserted in the other instrument. By the will of 1810 there were no legacies:—a form of codicil, however, was furnished to her by her solicitor. The will of 1810, not only superseded that of 1808—but was in great degree in execution of it, and represented it, for it was nearly to the same effect. It approaches the case of a draft which a person signs, and afterwards executes a will made from it; the draft is superseded, being entirely dependent on the will:—if the will is revoked, the draft is revoked also.

If the Court is of opinion that this will was for a temporary purpose, —and that a subsequent will was executed from it;—the question which has been made as to the revival would hardly arise. Therefore, I may relieve myself in a considerable degree from going into the cases cited; though, with respect to those cases, I cannot but observe that there is not, when the arguments come to be examined, much difference between the counsel with respect to the law. Those cases depend each on their particular circumstances. The only difference is, whether the presumption lies on the one side, or the other. For whether there is a presumed revival, or a presumed revocation; still it is admitted that the presumption, on whichever side it lies, may be repelled by circumstances; and the case would then resolve itself into a question of intention.

If it were necessary to decide the point, I should hold that it was not the presumption, when B. was cancelled, that A. should revive;—and supposing the general presumption to be in favour of a revival, I should be most clearly of opinion, that the presumption was repelled, and that it was not the intention of the deceased that A. should revive.

The question then comes to the cancellation of B.;—the Court must examine the appearance of the instrument itself;—the three sheets were connected by tape, sealed by her own seal, the same seal annexed to the will itself;—the fact is, that some one has carefully cut out apparently with scissors the whole of the instrument or margin, so as to detach it from its frame;—the attestation clause also is cut through.—It is the duty of the Court to put a rational construction on this act. In my judgment, it must have been done for the purpose of cancelling, revoking, and destroying, the validity of this instrument. I can put no other rational construction on the act;—it must have been done not equivocally, but decidedly, for the purpose of revoking the instrument;—the form of the codicil also is cut in the same manner, so that it is not improbable, considering the character of the deceased, that she thought it in some way necessary.

The instrument being presumptively revoked,—the next question is, by whom?—Here there can be no difficulty,—it was found in her own possession,—and it is not suggested that any other person had access to it.

The presumption that the act was done to cancel the instrument may be repelled by showing that it was done for some other purpose, or by some other person.—Purposes are suggested by the ingenuity of coun-

sel; but it is not enough to suggest; they must be proved. It is pleaded in the eighth article of the allegation, that the act was not done by the deceased, or by any person under her authority,—but the evidence adduced in support of the plea falls short of the averments. Indeed, it strongly disproves them, and confirms the presumption of law.

In the first place, paper C. was written in 1812. The deceased then intended a very different disposition,—her son George, who had been excluded by A. and B. under strong circumstances of resentment, when she wrote C. had been restored to her favour and bounty. It is by no means impossible, that when she wrote C. she might have cancelled B.

Before her death, something of a reconciliation had taken place with her son George, so as to admit him to an intercourse,—though it was not a very cordial one, as the Chancery suit continued.

It is more important to observe, that the confidence which, in 1808, she entertained in her son Thomas, had been a good deal broken in upon;—her letters have been introduced,—passages have been cited from them which mark her maternal affection; but there are passages also in these letters which mark her displeasure against this son.

The character of the lady is distinguished by intemperance of mind and capriciousness; at any time in her life this might have produced a cancellation;—she was not satisfied with her son Thomas's conduct while in Spain;—charged him with neglect of her affairs, and considered him as insane;—after his return, he committed what was, in her opinion, an act of great atrocity;—he married without taking her advice;—this was the same sort of circumstance which had induced her resentment against her son George;—and she declared that she was more dissatisfied with Thomas's conduct than with that of George.

These circumstances would naturally produce an alteration in the disposition of her property;—the result of the evidence is, that there was great resentment towards her son Thomas,—and it is proved that, till the last moment of her life, she wished Mr. Butler to prepare a new will.

All these circumstances, so far from repelling, confirm the probability that the act was done with intention of revoking.

Mr. French's evidence does not alter the view now taken by the Court;—she several times told him she had left her son Thomas every thing;—but on other occasions she said, "I have no sons or relations," and desired him to call on her every day;—shortly afterwards she repeated this,—Mr. French expressed his horror at her bequeathing her property from her family; but she said, she was determined to act as she thought proper;—finding her inflexible, he said, "he hoped she would do nothing to disinherit her family, and to leave her property in eternal litigation." To which she answered, "No, no, I have taken great care of that matter, though, God forgive me, I very near did something which would have made Tom remember, or suffer, (he cannot say which,) but if I die before I see Mr. Butler, which, from the pain in my side, I think very probable, there is a will by which the property will not go out of the family;—but really poor Tom is quite mad, and you must live here with him, and have knives that will not cut."

In the conclusion which this gentleman (who was not acquainted with other declarations of the deceased) drew from this conversation, it is

extremely difficult to concur. By what will, by what instrument, and to what extent, was this provided? One day, just before her death, she said Tom was not fit to be his own master;—nothing, therefore, could be further from her intention, than to place the whole of her property under his care and direction, and to make him her executor.

The Court, however, can place little reliance on the sincerity of declarations,—they are very easily misapprehended,—and a trifling word may alter the whole import of them,—and with a person of such a character, and under such circumstances, the declaration mentioned is too loose to be relied upon; and, above all, it would be extremely dangerous to depend upon them in opposition to the acts of the deceased;—she alludes to something she had done that morning,—it may have been cutting B.—or writing C.—or something else.

The declarations,—*that she had no son,—that she must make other friends,*—Mr. French says, *that she was inflexible,*—Mr. French's horror at her intentions.—I doubt a great deal, not what the witness, but what the deceased herself meant;—the Court must scrutinize declarations coming from the deceased, as well as from the witness;—there is nothing to show that B. was not cancelled after these conversations; from the expression “very near,” though she might not then have done it, she might have done it the next morning;—it has been admitted, that it was impossible to depend one hour upon her conduct;—her passion and caprice were so irregular, that the only conclusion we can come to is, that she had no fixt and determined mind upon the subject.

Here is an act of cancellation,—it must be presumed to have been done by the deceased,—there is no evidence to show that it was not done *animo revocandi*; every thing leads to the contrary conclusion. I pronounce against B.

Paper C. has been propounded;—the question is, whether it is a deliberative, or a complete paper;—if it is of the former description, there must be evidence to show that the deceased was prevented by the act of God from the due execution of it,—it was written on the envelope of a former will,—various interlineations and alterations occurred in it;—it states that she wishes it to be made in the following manner by a “lawyer approved,” George and Thomas Moore are struck through,—it leaves off in the middle of a sentence.—The counsel have hardly ventured to argue this as a finished paper, there is a complete departure from all other wills, and its several parts are quite inconsistent with each other,—it could only be sustained by evidence showing that she had come to a final resolution that this paper should operate as far as it goes,—there is not one tittle of evidence to supply the demands of law in this respect. Mr. Butler was sent for; but what to draw up the Court can form no opinion,—it must be at a loss to conjecture her settled intention. The only conclusion I can come to is, that she died intestate. She might have intended to die testate; but the Court cannot make a will for her,—it is enough that she did not intend either of these papers to operate. I must pronounce against them all:—and for an intestacy.

HIGH COURT OF DELEGATES.

MOORE v. MOORE and METCALF(a).—p. 406.

An Appeal from the Prerogative Court of Canterbury.

The Judges who sate under this commission were

Mr. Baron RICHARDS,
Mr. Justice PARK,
Mr. Justice ABBOTT,
Doctor ARNOLD,

Doctor ADAMS,
Doctor BURNABY,
and
Doctor GOSTLING.

A mutilation of a will held to amount to a cancellation, and that cancellation not to revive a prior will of nearly similar import.

Dr. *Phillimore*, Dr. *Dodson*, and Mr. *Heald*, for Mr. George Moore, and in support of the sentence of the Prerogative Court.

The argument necessarily divides itself into two branches:

First, Whether B. is a cancelled instrument.

Secondly, If B. should be held to be cancelled, whether A. does not, by necessary implication, and by construction of law, follow the fate of B.

As to the first point,—we submit that if the testatrix cut B. advisedly, the presumption must be that she cut it *animo cancellandi*.—That from the circumstance of its having been found in her custody, and no other person having access to the box in which it was kept, the presumption must be that she cut it herself.—And, lastly, These presumptions are confirmed and corroborated by the character of the deceased, and the state of her affections at the time of her death.

The manner in which B. has been cut, raises the inference that it has been advisedly cut;—the attestation clause was entirely cut through, one of the seals which fastened the different sheets together was broken, and the several papers in their detached state were found scattered about the box.—The rule of the civil law was, that if the testator had mutilated a will himself, the heir could not claim under it; but if it could be shown that another person had mutilated it, the will was good. (b) *Consultò quidem deletà exceptione petentes, repelluntur; inconsultò verò, non repelluntur, sive legi possunt, sive non possunt, quoniam si totum testamentum non extet, constat valere omnia quæ in eo scripta sunt. Et si quidem illud concidit testator denegabuntur actiones: si verò alius, invito testatore, non denegabuntur.* The expressions in this passage

(a) Paper C. was not propounded in the Court of Delegates; but the committee of Mr. Peter Moore, who had prayed probate of that paper in the Prerogative Court, joined with Mr. George Moore, in praying an intestacy, and appeared by his counsel: after some preliminary discussion, however, the Court refused to hear them, on the ground that there had been some informality in the mode of adhering to the appeal.

(b) Dig. Lib. 28. tit. 4. c. 3.

seem to characterize the very species of mutilation this instrument had undergone.

Such being the appearance the instrument presents on the face of it, a Court of law is bound to put some construction upon the act;—it will not be sufficient to say that the testatrix, (if such she is to be called,) has done it in sport, or to while away a vacant half hour,—if she did it advisedly, the law will fasten on her the conclusion that she did it *animo cancellandi*.

Again, from the care with which the will was preserved, and from the place of its deposit being accessible to herself alone, the presumption must be, that she cut it herself. *Sin de facto testatoris haud quidem liqueat, sed testamentum tamen scriptum domi testatoris, et in arcâ reperiatur deletum, aut incisum; etiam tunc ex voluntate testatoris id factum præsumatur.* (a)—Moreover it was found together with paper C., which paper, if completed, must have utterly annihilated it.—In the eighth article of the adverse plea, it is stated, “*that when paper B. was found after the deceased’s death, it was in the same plight and condition as it now appears, and that the cutting off the border or margin of the said paper was not done by the deceased, or any person under her authority or direction, with a view to destroy, cancel, or revoke, the said will; but that down to the time of her death she recognized, and considered the said paper-writing B. as her last will and testament.*” It was extremely essential to have established this fact, and yet no evidence whatever has been adduced in support of this article of the allegation;—by the witnesses examined, and the letters produced, the affections of the deceased at the latter period of her life, appear to have been alienated from her son Thomas. Letters of the 28th of July, and the 10th of Aug. are important in this view, as they embrace the period about which C. was written.

C. too, but for the postscript, would be a finished paper; and in it we read recorded by her own hand, that Thomas was undutiful and disobedient;—he is placed on a level with George, for whom she entertained so deep-rooted an aversion,—and every will she had ever made is annulled.

On this part of the case the character of the deceased is important;—it is impossible not to be struck with the extraordinary features by which it is delineated in the evidence before the Court,—her irritable and anxious mind,—the vehemence of her passions,—her tendency to act strongly and permanently on the impulse of the moment, all paved the way for the misery, vexation, and disappointment, which she was destined to experience in her latter days.—In return for the passionate affection she lavished on her children, she exacted from them implicit obedience and submission to her will;—and above all things, she held that they were bound to consult her wishes alone, in disposing of themselves in marriage;—to a mind constituted like this,—influenced by the fervour of such warm affections,—and liable to the agitations of such stormy passions, the transition from ardent love to violent hatred was natural and easy; the eldest son whom she had doated on to such an excess as to excite the jealousy of his younger brothers, had for many years been to her an object of aversion. Is it, therefore, surprising, or inconsistent with the ordinary course of human passions, that the young-

(a) Voet ad Pand. lib. 28. tit. 4.

est son, when he conducted himself in a manner similar to his eldest brother, should have excited in her mind similar feelings of indignation and resentment?

If we have established that B. was mutilated *animo cancellandi*;—it will be very difficult to maintain, that when she did this act, she did not also intend to cancel A.,—the wills are so essentially identified, that one appears to be little else than the rough draft from which the other was transcribed,—the same person was executor in both, and both contained substantially the same disposition of her property.

But we may carry the argument higher, and assert that by construction of law, A. was destroyed when B. was completed;—and that A. being destroyed, in order to have given effect to it again, there must have been some act of republication,—or some revival by necessary implication,—or something in short to show that it was the wish and intention of the deceased, that her first will should take effect after she had cancelled her second. This is the clear language of the Roman law. (a) *Posteriore quoque testamento quod jure perfectum sit posterius rumpitur, nec interest, extiterit aliquis hæres, an non,—hoc enim solum spectatur, an aliquo casu existere potuerit. Ideòque si quis aut noluerit hæres esse, aut vivo testatore, aut post mortum ejus, antequam hæreditatem adiret, decesserit, aut conditione, sub quâ hæres institutus est, defectus sit, in his casibus pater-familias intestatus moritur. Nam et prius testamentum non valet, ruptum à posteriore; et posterius æque nullas vires habet, cum ex eo nemo hæres extiterit.* In the same book of the Institutes under the head of *quibus modis convalescit testamentum* there is a further illustration of this doctrine: *Instit. Lib. 2. tit. 17. s. 7.* All the commentators have concurred in the sense and stringency of these passages;—the expressions of Vinnius are, *nec prioris testamenti sublatio pendet ab eventu aliquo, aut casu contingente post mortem testatoris, sed illud statim vivo adhuc testatore ipso jure per posterius rumpitur.*

This doctrine will be found also in the Digest *Lib. 28. tit. 3. s. 2.*, and in several passages of the code (b);—and it was carried so far, that if a man, having made his will, was adopted into another family, and afterwards became emancipated, it was necessary that there should be some act to revive the will: *Dig. 37. tit. 11. c. 11.*

We are not, however, driven to stand on the extreme of this principle;—in looking to cases, we may anticipate that that of *Goodright v. Glazier*, 4 Burr. 2512, will probably be pressed against us: it may be observed, however, that the decisions in that very case admit that, under circumstances, the first will, though found entire, might have been held in law to be cancelled;—both Lord Mansfield, and Mr. Justice Yates, admit that such a case might exist; but whatever may be the weight and authority of *Glazier's* case in Courts which are bound up by the dicta of the Judges of the Courts of King's Bench, here we can only look to it as expressing the opinion of wise and enlightened judges, as to the law which rules in the disposition of real property,—here it cannot be considered as having any binding authority,—for here we have in the records of this very Court an uninterrupted series of decisions for upwards of a century, flowing in a contrary course.

(a) *Instit. Lib. 2. tit. 17. s. 2. de posteriore testamento.*

(b) *Tunc autem prius testamentum rumpitur, cum posterius jure perfectum sit.*

In *Whitehead v. Jennings*, Prerog. 1713. Deleg. 1714. Anthony Keck made his will in Aug. 1701; in 1712 he made another of a totally different tenor, in which his nephew was appointed executor and residuary legatee;—in an access of passion against his nephew, he burnt the latter will,—he afterwards became reconciled to him, and sent for Mr. Tolson, his attorney, to make a new will;—before the attorney arrived, he was taken suddenly ill, and died in the course of the night, calling anxiously for him. The will of 1701 was propounded; but the Court pronounced for an intestacy.

In *Burt v. Burt*, Prerog. 1718, a will made in 1669 was found in the closet of the deceased; it was pleaded and proved that he had made another will in 1713;—the only account given of that will was, that the wife said she had destroyed it, having found it in a cancelled state;—she was materially benefitted under the existing will, and the Court pronounced for an intestacy.

H. 242. In *Helyar v. Helyar*, Prerog. 1754. Robert Helyar died in June 1751, a bachelor, leaving Joanna Helyar a sister, William Helyar his nephew, and two nieces;—by a will of Feb. 12, 1742, he bequeathed to his sister the moiety of a small estate they possessed together in joint-tenancy in Cornwall, and 2000*l.* in money. All his other estates and property he left to his nephew, whom he constituted also his executor and residuary legatee;—he declared to his solicitor, that his object was to keep the real estates in the male line of the family.—The nephew made his will on the same day, by which he left his property to the uncle, and they exchanged copies of their wills;—afterwards the nephew married, and had a son;—his uncle's affections became alienated from him, and in process of time he completely quarrelled with him, and declared he should never be benefitted by him; and, accordingly, on the 19th of Dec. 1745, he made another will, in which his sister was executrix and residuary legatee in the stead of the nephew;—that will was not found at the death of the deceased; and it was established to the satisfaction of the Court, that the deceased had destroyed it himself. The case was argued at great length before Sir George Lee;^(a)—five points were made in favour of the will of 1742.—First, That it was contrary to the statute of frauds to receive parol evidence of a will which did not exist.—Secondly, That there was not sufficient proof of the factum of the second will.—Thirdly, That the executing a second will was not of itself a revocation of the first.—Fourthly, That there was proof that the second will was destroyed by the testator himself.—Fifthly, That if the second will was destroyed, no act of revival was necessary to set up the first.—Sir George Lee, however, decided against the will propounded, and pronounced Mr. Helyar to have died intestate, expressly on the grounds that the execution of the second will was a revocation of the first;—and that where a second will had been destroyed, some act of revival was necessary to set up the first.

In *Arnold v. Hoddie*, Prerog. 1765, the deceased made a will in 1753, in favour of Miss Arnold, whom at that time he was about to marry,—he afterwards quarrelled with her;—in 1760, he made another will, by which he bequeathed his property to a sister;—the latter will was not found at his death, nor was there complete proof of the execution of it; but his aversion to Miss Arnold was proved, and Sir George Hay pronounced against the existing will.

(a) From the manuscript notes of Sir Geo. Lee.

As to the effect of these cases we do not mean to contend, that under all circumstances, when a second will is destroyed, one anterior in date cannot revive; what we maintain is, that we have so far adopted the civil law into our decisions as to consider the factum of a second will as a presumptive revocation of a first, and that the burthen of proof is by such a circumstance thrown on the adverse party to repel that presumption. On the other hand, where circumstances have been such as to show clearly that the deceased intended the first will to revive,—these Courts have pronounced for them, as in *Stacey v. Dickens*, Prerog. Easter Term, 1724; *Vanier v. Hue*, Prerog. 1724, and in the later case of *Passey v. Hemming*, Prerog. Michaelmas Term, 1809—Deleg. 1812; but it has been only in cases where the intention has been satisfactorily made out, that the presumption of law has been held to be repelled. The present case is stronger in its circumstances than either of those which were successively decided by Sir Charles Hodges, the Delegates, Sir George Lee, and Sir George Hay.

For the purposes of this argument, the cancellation of B. is a strong circumstance against A. The writing of C. is a powerful argument against A.,—the declarations of Mrs. Moore that “*she would make her will as if she had no sons*,”—that “*Thomas and George should never inherit her property*,”—her refusal to see Thomas Moore’s wife,—her indignation at his marriage,—her sending for Mr. Butler to make a new will when she was dying,—are all strong circumstances to show *quo animo* B. was cancelled,—and that by cancelling that paper, it never could be her intention that A. should revive.

Mr. *Warren*, counsel for Mr. Thomas Moore, contra.

The first question undoubtedly will be, whether B. is cancelled;—the second will be whether, if B. is cancelled, A. is in force,—i. e. whether B. which is originally upon the face of it a perfect will, has been, by any thing which has happened to it since, cancelled; and if so, whether by cancelling B., paper A. is revived, and is to all intents and purposes the same as if B. had never been made.

To say that B. is cancelled on the face of it, is very much to overstate the case;—no case,—no decision, has been adduced in support of this assertion: if this is to be decided by bare inspection, let us look to the rules which Swinburne (a) lays down on this head. “*The third case is when the whole testament is not cancelled or defaced, but some part thereof only rased, blotted, or put out; for the other parts of the testament do remain firm and safe, as they were before, although the deletion were in the chief part of the testament, namely, the designation of the executor.*”

If, therefore, a testament were drawn over with lines, there can be no doubt but that it must be considered as cancelled; so if it were drawn over with cross lines diagonally, in either case to repel the presumption, there must be evidence to show that the party did not mean to deface it.—Here there is nothing crossed or blotted out;—if, instead of this will being cut, a line had been drawn along the top, passed down the side, and through the attestation clause; could it be contended that the will was cancelled on the face of it,—for there is no difference between the act of a knife and the act of a pen;—it is material whether it be a cancellation *prima facie*, or not;—if it is not, unless there is sufficient

(a) Swinburne, Part VII. s. 16, p. 515.

evidence to show that the party intended to cancel it, it remains a good will. Suppose again, this margin not to have been found; and that the will had been found without it in the drawers of the testatrix where she usually kept her papers of consequence; could it be said she did not keep it as her will?—if she did not, why was it there?

Our opponents are not entitled to ask the reason why she cut the paper, for the paper is in itself perfect as a will; they, therefore, are to show that this was done *animo cancellandi*;—cutting through the attestation clause cannot be of more importance than cutting through the name of the executor; and we have seen in what light Swinburne regards that when he states that, though you cut out the assignation of the executor, still the will is good.

Per Curiam. Mr. Justice Abbott, “Blot out,” not cut out.

Mr. Warren, “Erase, blot, or put out.”

Per Curiam. Mr. Justice Abbott, Erase does not apply to cutting out.

Mr. Warren, In whatever way it was done, it would not alter the argument; evidence may be given to show for what cause it was done; but whether cut, or drawn round with a black line, it can make no difference. We can only say there are many things done for which we can give no account.

If, however, it should be held that there is something on the face of this paper which we are called upon to explain, then we have abundant evidence to show that she did not intend to cancel it.

Bibb v. Thomas, 2 W. Bl. 1043, was a case in which circumstances were equally strong as here; there evidence was brought by the heir at law, who claimed against the will, to show the intent with which the act was done. If the Court is of opinion that explanation is necessary, the letters, and the evidence supply it: in the former we see the language of a mind in a great degree subsiding from the anger she had once felt towards her son; and there are a variety of instances in them, as well as in the depositions, where she speaks of him with great affection.

The next question is, supposing B. to be cancelled, what is the effect of that cancellation upon A.?—And this is a question of great importance,—of great extent,—and of considerable nicety, in consequence of the cases which have been cited. In *Goodright v. Glazier*, 4 Bur. 2512, the same argument was used, which has been used by my learned friend on the other side; but it was over-ruled by the Court.

There is no doubt but that the repeal of a subsequent statute sets up a preceding statute. This is a law as old as any in the country, and why? because the act which showed the change of intention is removed by a subsequent act. It is difficult to conceive how these two cases are to be distinguished. What is supposed to repeal the first? Undoubtedly the second.—But then it is argued, the second will shows a change of mind;—to be sure it does,—it shows there was a change of mind at that moment. But does not the destruction of the second instrument show a change of mind again?—As altered, it is to take effect if the party does not change that will,—and that is the distinction. His mind is shown by the expression in the second will, if he does not cancel that. The will is ambulatory, and so it is no evidence of a change of intention so as to affect the former; and this appears to have been the opinion of Lord Mansfield, and as Mr. Justice Yates says, “*a will has no operation till the death of the testator*, it is the expression of a man’s mind

to take place after his death;—as long as he lives he may alter his opinion. I tear the paper which expresses my sentiments,—then, has not my mind reverted?—he has revoked the revocation,—and his mind comes back to its first intention.”

In *Harwood v. Goodright*, Cowp. 91, Lord Mansfield says, “*it is settled, that if a man by a second will revoked a former, yet, if he keep the first will undestroyed, and afterwards destroy the second, the first will is revived.*” Lord Mansfield, speaking the sense of the Court, considers this as a clear established rule at Common Law.—It stands upon the authority of these two cases.

Per Curiam. Mr. Justice Abbott,

That would go a vast length;—if you put it as an absolute proposition at law without any deduction, that the cancellation of the second will revives the first. Suppose a man, having a wife and one child, should make a will, leaving his property in a manner suitable to the then state of his family,—that he should afterwards have six children born, and then should make a will, which he should afterwards destroy. By setting up the first will, you would leave five of the children unprovided for.—If you put it as an absolute proposition, that the cancelling of the second will would revive the first, cases might be put so distressing as to make one feel a little whether it was right.

Mr. Warren, Your lordships will do me the justice to recollect that I have only cited authorities.

Per Curiam. Mr. Justice Abbott, Certainly; and I put the question to you that you may fortify your opinion by reason as well as by authorities, if you can.

Mr. Warren, I presume to go no further than the authority of those cases, which certainly do lay it down as a decided principle of law without limitation.

Per Curiam. Mr. Baron Richards, But I think I may venture to say it has not been universally so considered.—It is a great misfortune that dicta are taken down from Judges, perhaps incorrectly, and then cited as absolute propositions.

Mr. Warren, I do not apprehend there can be any mistake in the report: when Lord Mansfield mentions it, he does not say it is decided in such and such a case; but he considers it as a point perfectly established.

Per Curiam. Mr. Justice Abbott, It certainly in the report is put as the settled law, excluding all question of intention.

Mr. Warren, If it is the law, therefore whatever inconvenience may arise from it, it must remain the law, till it is altered by the legislature, and nothing short of an act of parliament could do this; and, even admitting that possible difficulties may apply to this rule of law, this is not that kind of case which would call upon the Court to depart from the rule on account of any peculiar hardship.

In *Wright v. Netherwood*, Prerog. May 6, 1793, 2 Salk. 593. (ed. Evans,) Sir William Wynne observed, “*the point seems a good deal like that which has been a vexata quæstio in these Courts, and brought before the Courts of Common Law, whether a will, which is revoked by another, is set up by the destruction of the second.*” So that Sir William Wynne coming many years after Sir George Lee, considered it as a vexata quæstio;—the decision, therefore, in *Helyar v. Helyar*, could not have set the question at rest. “There was a case to that ef-

fect," he says, "before Sir George Lee, *Helyar v. Helyar*, in which it was held that the will being once revoked, remained so: but there was an appeal from that judgment to the Delegates, and it was never determined by them; the case of *Glazier* was directly contrary to that, and it was held that the first will was good." If, therefore, there was any meaning in words, he thought the latter decision the correct one. Supposing this case sent before a jury to decide, there can be no doubt but that, on the authority of the cases cited, they would find for the will: but then, says my learned friend, the Ecclesiastical Law is different;—you cannot have the personalty;—it may be a very good law for the realty, but it is a very bad one for the personalty.—This appears a strange proposition: there is no difference in the facts,—nor in the conclusion. It cannot be said, that a different conclusion is to be laid down as matter of law, there being nothing but the simple fact, that one relates to a landed, the other to personal estate. What is the ground of Sir W. Wynne's opinion in *Wright v. Netherwood*, that *Helyar's* case was wrong? Why? because the Court of King's Bench had decided the contrary;—indeed, if this is the law, as I apprehend from these cases it clearly is, in the Court of King's Bench, it must be the law in the Ecclesiastical Court: it is impossible there can be one law applying to real estate,^(a) and another to personalty. Moreover in this Court *Passey v. Hemming* is directly in point in our favour.

Lastly, parol evidence cannot be admitted to affect paper A. There may be parol evidence to affect B. I admit it, because there is something on the face of B. requiring explanation:—but suppose B. cancelled, what is there on the face of A. requiring explanation?—A. is a perfect will;—and if it had been the only paper in existence, there could have been no question about it; and, under the statute of frauds, no parol testimony can be given under to affect A. Stat. 29 Car. 2. c. 3. s. 22. If parol testimony is admitted, it must be in direct violation of this clause. Upon the face of the will all has been regular. Then no evidence can be given; if it were otherwise, verbal evidence might set aside a written will, and do all the mischief the statute of frauds was enacted to prevent.

Dr. Jenner, Dr. Lushington, and Mr. Taddy, on the same side with Mr. Warren. With respect to the cancellation, reliance has been placed on a passage from the Digest; and it has been argued, that the word *concido* expresses exactly the species of mutilation which this paper has undergone: but when we come to look for the meaning of this word in dictionaries, we find it is that which least expresses the appearance of this paper; for it means to *cut in small pieces, to tear to pieces*. In the dictionary of Ainsworth there are five meanings, one metaphorical, the others go to the complete destruction of the thing, to chop, to mince, to hurt, to ruin, or utterly destroy, i. e. if you find that the deceased has done an act which shall destroy the effect of the instrument, or the material upon which that instrument is written, then you may presume it to be a revocation, or act otherwise. Four modes of cancellation are pointed out by the statute of frauds,—by tearing, burning, cancelling, or obliterating: the act, therefore, which is to cancel an instrument, must be such a one as shows an intention on the part of the deceased, that that instrument shall not have effect; it must be an act that at the time of doing it shows that it was the intention of the deceased that the in-

(a) Prerog. 1808. Deleg. 1812.

strument should be destroyed by the act then performed upon it;—this is the meaning of the methods found out by the statute of frauds for destroying a will of landed property. Those cited from the civil law, are to the same effect; they imply that there shall be an act done not equivocal in itself, but which shall necessarily import an intention to destroy the instrument to which the fact is applied.

The substance of the paper remains complete; the greatest care has been taken that not a syllable of it should suffer from the act: it is true that, in cutting it, the attestation clause is cut through; but this is clearly not advisedly done; it was upon the second sheet of the will; it is the effect, therefore, of accident, and not of any intention to cut through the essential part of the instrument itself. This is further confirmed by her not having cut through the attestation clause of the codicil;—if the act is at all equivocal, the burthen of proof is on those who impeach the validity of the instrument, to show that it was done *animo revocandi*, and that proof must apply most strictly to the act itself.

The other point of the case is of extreme importance, and one upon which a decision on the point would be highly desirable, not only in this, but in all courts where questions concerning wills are agitated. We maintain that, according to the principles of this, as well as of the Temporal Courts, a paper revoked by the execution of a subsequent paper is, by the cancellation of that subsequent paper, revived. The case of *Glazier v. Glazier* has established the law on this point: during the discussion of *Passey v. Hemming*, Mr. Justice Heath produced a note he had himself taken in Court of the judgment in *Glazier's* case, which carried the doctrine further than the case as reported in Burrows, does. —A statute which has been repealed, by the repeal of the repealing statute becomes operative again; and upon general principles it must be so held that the suspension of a second act revives a former act.

Per Curiam. Mr. Justice Abbott,

Put this case,—a will giving an estate to trustees for the benefit of A. with some few legacies. Let the testator make a second will giving that estate to A. and B. in joint-tenancy;—suppose B. to die, and several of the legatees,—the effect of the instrument will be the same upon an estate of some thousand pounds, with the exception of some few hundreds;—would you say, that the destruction of the second will is to set up the first;—the generality of the principle would rule that. *Glazier's* case comes near that;—and if you compare it to the repeal of a statute, you must go to that extent.

Argument resumed.

The doctrine of the Ecclesiastical Courts does not go to that extent undoubtedly.

With respect to the authorities from the Digest, they have nothing to do with the subject; they have no bearing upon it;—ours is not the civil law of Rome,—our proceedings are grounded upon the *Jus Gentium*;—rules proper for the Roman people would be improper for a country like this;—we all know the solemnity with which wills were executed at Rome. The civil law said that, when once a will is perfected, there it must remain; in many instances it could not be revoked, it was not ambulatory, the principle was the opposite of ours.—With us, no testament can be of effect till after the death of the testator;—we are, therefore, to appeal to common law, and not to civil law, for authority.

In *Jennings v. Whitehead*, it appears that the deceased had told Mr. Tolsen, his solicitor, that he had a will in his possession, which was not to his mind;—that he was reconciled to his nephew Richard, and meant to give him 2,500*l.* in Hampshire. It is a case too, in which the whole tenor of his life, subsequent to 1713, shewed that the person he had once made executor and residuary legatee was never meant to be so again; it was pronounced to be an intestacy, because there was evidence to show it could not be his intention by the revocation of the second will to revive the first; the intention was clearly shown to be contrary.

In *Burt v. Burt*. The only evidence as to the destruction of the second will was, that of the wife, by whom the destruction had been made; it is impossible, therefore, that there could be any evidence to show that it was his intention that the first will should revive.

In *Arnold v. Hoddie*, when the instructions were given for second will, the first will and a codicil were in the hands of an attorney, and the testator had no opportunity of cancelling them; circumstances showed that it was impossible he could have meant the will to revive.

In *Helyar v. Helyar*(a), Sir George Lee's judgment cannot be taken as a decision upon the law that an act is necessary to revive? Whatever may be his opinion, he does not decide that; he considers all the circumstances as material. The case of *Helyar*, therefore, only goes to this, that circumstances are material to show intention; and Sir George Lee would probably have decided differently, had the case of *Glazier* been then decided.

Wright v. Netherwood shows Sir W. Wynne's opinion.

Passey v. Hemming has however, as it has been generally understood, entirely disposed of this question: it unfortunately happens that we are in the dark as to the grounds of the decisions in this Court; but it is reasonable to conclude from that judgment, that some act or declaration is necessary, in the case of a subsisting will, to show it was the intention that it should not revive. The will established was in 1780;—the testator died in 1807;—it consisted of two separate papers, written within a short period of each other;—they were attested only by two witnesses, and consequently were not good to pass real estates;—he had made subsequent wills, and to a late period of his life was occupied upon another will, which contained a different disposition of his property; but it was unfinished. The will of 1780 was found in a drawer in a garret, and there was nothing to show that they had ever been recognized by the deceased. Sir W. Wynne said, he should have felt extremely unwilling to have been bound to have pronounced against

H.242. (a) In the mention which is made of this case in the report of the case of *Goodright v. Glazier*, 4 Burr. 2512, Sir George Lee's judgment in *Helyar v. Helyar* is erroneously stated to have been affirmed by the Delegates,—the fact being that the case was compromised in the Court of Delegates, and consequently did not come to an hearing there. In the manuscript notes of Sir George Lee, after the recapitulation of the grounds of his judgment, I find the following memorandum:—N. B. “Mr. William Helyar has appealed to the Delegates, and prayed a commission of Lords Spiritual and Temporal: but, on hearing counsel, Lord Chancellor granted it only to judges and civilians, because the questions in the cause turned upon points of law.—The cause was afterwards agreed, and Mr. Helyar renounced his appeal, and consented that the cause should be remitted back to the Prerogative Court, and upon the remission being brought in, I decreed administration to the sister and only next of kin, on the 19th of January, 1757.”

them; but he was not: he considered *Helyar's* as a case of circumstances from which it was impossible to believe that the first will contained his last intention,—a departure of intention had been shown by the variation in the second will, and that variation was proved not by mere circumstances, but by the execution of the second will.

In another point, this case essentially differs from all those in which the subsisting wills have been held to be void; namely, that in all of them there have been different executors, in the second will from the first;—a circumstance strong to show a complete change of intention;—here the executor is the same under both instruments.—It is remarkable that all the finished wills in this case show continued affection towards the same person, and this is not contradicted by any act of the testatrix, showing any intention to dispose of her property in a manner injurious to him. There has not been any act established under her own hand, as an operative will, indicating a change of intention.

The law of the Ecclesiastical Court is, that there may be evidence given that it was not the intention of the testator that the first will should be revived by the cancellation of the second; but that, if such evidence is not produced, the presumption must be, that he meant to revive the first. The operation was only suspended by the factum of the second will; and the moment the second will is cancelled, that suspension is taken off.

Dr. Phillimore in reply.

Important as the case is on account of the principle of law it involves,—the importance of it has been augmented by the course of argument adopted on the other side;—it has been contended,

First, That if B. is a cancelled paper, we are precluded by the statute of frauds from entertaining any question whatever with respect to the validity of A.—Secondly, That if the Court of King's Bench would pronounce for A., the Court of Delegates is bound to do the same.—Thirdly, That the Digest has nothing whatever to do with the question.—If either of these objections are founded, we must be content to admit that there is an end of the question at issue. It is essential, therefore, that they should be set at rest.

Parol evidence is not introduced here to revoke a written will;—but to prove a fact, viz. whether A. is a will or not. The evidence is introduced not to revoke A., but to show that B. had ceased to be a will;—cases of this description have been held not to fall within the statute of frauds; and the practice of the Prerogative Court has, ever since the passing of that statute, been to establish unfinished and unexecuted papers, whenever it can be shown that it was the intention of the deceased continued to the latest moment of his existence, that they should operate, even in cases where the most regular and formal wills have been found entire and uncanceled.

The objection is not new;—we find from a note of the judgment in *Helyar v. Helyar*, in the handwriting of the eminent judge who decided it, that a similar objection was pressed in that case to any inquiry being made into the factum of an existing will;—"but," to use his language, "the case(a) of *Sellars v. Garnet* in the Prerogative, October, 1748, was full to this point; for there an executed will was held to be revoked by a will wrote while the testator was alive; but he died

(a) Cited from Sir George Lee's manuscript notes. In the case of *Helyar v. Helyar*, Prerog. Jan. 8, 1754.

before it was brought to him, and the contents thereof were proved by witnesses who heard him give the instructions agreeable to what was wrote down. It was insisted that this parol evidence could not be received; that it was to revoke a written will by parol only, contrary to the statute; but both Dr. Bettesworth in the Prerogative, and the Delegates who affirmed this sentence in 1751, were of opinion that it was a will in writing, that the parol proof of the instructions ought to be received, and that it was not a case within the statute of frauds."—This was the doctrine held in 1751; and subsequent practice has established and confirmed it.

The second point made against us is, that if it could be shown that the Court of King's Bench would hold paper A. to be a will;—this Court would be bound to establish it, inasmuch as it never can be said that there is one law for personal, and another for real property. To this we reply, that the Court of King's Bench has no authority whatsoever over the decisions of this Court. The argument, if good for any thing, would go to constitute it as a Court of Appeal from the Ecclesiastical Courts. If so,—for what purpose is the Court of Delegates convened, by commission under the great seal, to hear all appeals made to the king by virtue of the statute of Henry VIII.?—and why is a still ulterior tribunal by a commission of review sometimes opened to suitors in this Court?—The Ecclesiastical Courts exercise an independent jurisdiction in all cases over wills of personal property:—the law they administer, from whatever sources derived, is incorporated into, and has for centuries formed part of, the established law of the land;—the Court of Delegates is to them a Court of dernier ressort; the rules of law, and the decisions which have been handed down to your lordships by your predecessors here, are to be the sole guides of your sentence.—The evil and inconvenience arising from the diversity of testamentary law in the Temporal and Ecclesiastical Courts is imaginary;—the diversity exists to a great extent already;—the will which can pass personal property to the greatest amount which the talent and industry of a British subject can accumulate it, may have no effect, and in practice frequently has none, over landed property; while it is valid with respect to one, it is a perfect nullity as to the other.—Indeed, if it were permitted to us to look to the policy of a diversity of this kind in the administration of the testamentary law of England, we should confidently maintain that it was wise, politic, and well adapted to the mixed interests of the opulent and commercial country in which we live, that there should be a greater facility in disposing by will of personal than of real property. But this difference exists on great points of every day's occurrence;—what evil then can result from it on a point which can only arise for decision now and then in the course of a century? It is sufficient, therefore, only to state on this part of the case, that if it can be made out satisfactorily, that, according to the course of decisions in the Ecclesiastical Court, this lady would have been held to have died intestate, the Court of Delegates is bound to affirm this sentence; and that, even though cases might be cited from Courts of Common Law leading to a directly contrary conclusion.

Thirdly, The assertion that the Digest has no bearing on the subject, could only have been resorted to under the conviction that it was impossible to open the Roman Code without being overwhelmed by the force of the authorities which pressed against the argument of our op-

ponents.—The position is novel to the extent, at least, to which it has now been laid down;—the civil law is not the text law of the Court in all instances; but it is positively so where our own law is silent: and beyond this, the whole of the testamentary law which we administer has its basis in the civil law; and, without an intimate knowledge of the Roman code, it would be impossible to acquire a knowledge of our practice, or understand the principles of our decisions.—To illustrate this, by an example familiar to every one:—the birth of children by the Roman law amounted to the revocation of a will; we have not adopted it to this extent; with us marriage and the birth of a child amount to presumptive revocation of a will;—can any one be heard to maintain that we have not adopted our rule from the civil law?—What was the conduct of Lord Camden, *Shepherd v. Shepherd*, T. R. 51, when a question of this sort came before him?—He directed an issue to Sir George Hay to try the question, because the Civil Law Courts were best competent to expound the law on this subject;—so it is in this case,—by the Roman law the cancellation of a second will ipso facto, revoked a first;—with us a second will cancelled, is a presumptive revocation of a first;—we do not push the argument further than this,—we admit that the presumption may be repelled by circumstances. That the civil law has always been considered as the basis of the law of the Ecclesiastical Courts, we have only to refer to the dicta of Sir George Hay(a), Lord Camden, Lord Mansfield(b), and Sir George Lee, which occur in the several cases which have been cited in different stages of the present argument.—But it has been argued that the civil law is diametrically opposed to the testamentary law of England in principle; because, by the civil law, a will took effect in the lifetime of the testator, and was not ambulatory;—once made it could not be revoked,—the testator himself had not the power of cancelling it;—it happens, however, unfortunately for this observation, that the maxim which is described as so peculiarly characteristic of the English testamentary law, is a fundamental maxim of the Justinian code(c), and was transplanted from the Digest into the law of this country.

With respect to the points more immediately under discussion; it has been laid down broadly that, under all circumstances where the second will is cancelled, the first will must as it were ipso facto revive. Would this be a rule consistent with reason? Would it be desirable on grounds of public policy and justice, that a rule of this description should be stern and unbending,—that there should be no limitation to this doc-

(a) It was further objected, that by the Roman law, by which we proceed in this Court, the birth of children operated as the revocation of a preceding will. I agree that this is rightly stated from the Roman law,—and that the *Roman law*, in general, guides our decrees; but it guides our decrees no further than where it is uncontradicted by the English law.—*Sir George Hay's judgment in Shepherd v. Shepherd*, T. R. p. 51.

(b) Though, as to personal estate, the law of England has adopted the rules of the Roman testament; yet, a devise of lands in England is considered in a different light from a Roman will.—*Lord Mansfield's judgment in Harwood v. Goodright*, Cowper's Reports, p. 91.

(c) Quemadmodum circa fideicommissa solemus vel in legatis, cum de doli exceptione opposita tractamus, ut sit ambulatoria voluntas ejus usque ad vitæ supremum exitum. Dig. Lib. 24. tit. 4. c. 4.

Quod si iterum in amicitiam redierunt et pœnituit testatorem prioris offensæ; legatum vel fideicommissum relictum redintegratur: ambulatoria enim est voluntas defuncti usque ad vitæ supremum exitum. Dig. Lib. 34. tit. 4. c. 4.

trine,—no qualification of it, whatsoever? Cases of extreme hardship will suggest themselves readily; cases in which the intention of the testator (the only sure guide for all Courts of testamentary law) might be obviously defeated by such a rule. Let us suppose for instance, that the cases of *Whitehead v. Jennings*, and *Arnold v. Hoddie*, had come before the Court of King's Bench, with a full development of all the circumstances which were laid open to the Ecclesiastical Courts;—and can it be contended that in either of those cases the Court of King's Bench would have felt itself bound to have decided in favour of the subsisting wills? And yet it has been pressed, on the authority of *Goodright v. Glazier*, that the law is absolute and unalterable, and cannot be changed but by an act of parliament.

In *Glazier's* case the will destroyed, and the will subsisting, benefited the same person; and there does not appear to have been before the Court one single circumstance to show that the deceased had in the slightest degree varied from the affection he entertained for the person to whom he had bequeathed his estate.

In *Harwood v. Goodright*, the doctrine goes no further than this, that a subsequent will, though it be found to contain a different disposition from a former will, yet if the particulars of that difference are unknown, cannot operate as a revocation of it.

If we have been successful in showing the civil law is to guide our decisions,—our argument remains untouched;—since it is clear both from the text law, and the writings of the best commentators, that there can be no doubt as to the language of the civil law on this part of the case;—the passage before alluded to from the commentary of Vinnius, embraces the whole argument. “Fingamus(a) rursus testatorem, testamentum quod secundo loco fecerat, ac perinde quo prius ruptum erat, incidisse.—Quæritur an restituatur prius, cujus tabulæ integræ manserant? Papinianus respondit, si id hoc animo à testatore factum sit, ut priores tabulas supremas relinqueret: voluntatem quæ defecerat recenti judicio rediisse et posse secundum tabulas priores bonorum possessionem pati. At inquires an non sic testamentum citrà ullam solemnitatem nudâ voluntate constituitur? Negat hoc jurisconsultus atque hanc objectionem sic removet, ut dicat, non quæri hic de jure testamenti, sed de viribus exceptionis, quo significat, recenti isto judicio, et simplici voluntate testatoris non constitui novum testamentum; sed si scriptus priore testamento hæres agat, et hæreditatem vindicet, eique objiciatur exceptio mutatæ voluntatis, posse eum hanc exceptionem elidere replicatione voluntatis reversæ, si constet, testatorem hoc animo, posterius testamentum, incidisse, ut prius iterum valere vellet.”—Throwing the burthen of proof therefore completely on the party setting up the instrument, and exacting from him some act to show that it was the intention of the deceased that the first will should revive.

Per Curiam. Mr. Justice Abbott,

The concluding sentences of the passage you have referred to, seem to me to make very strongly for your argument,—stronger even than those which you have cited: “utique enim hic animus, ab hærede scripto, omninò probandus est, per codicillos putà, aut alias literas, quibus testator palam declaraverit, se velle priores tabulas valere, alioqui eum,

(a) Vinnius in Instit. lib. 2. tit. 17. s. 6. c. 2.

tanquam quem utriusque voluntatis pœnituerit intestatum potius decedere voluisse interpretabimur."

Argument resumed.

Other passages might be cited to the same effect.—From them the law of this Court is deducible. The practical operation of it has been established by a series of cases occurring at intervals from 1714 to 1765. It has been admitted that no decision has occurred on this point from the case of *Arnold v. Hoddie* in 1765, to that of *Passey v. Hemming* in 1812. But it has been contended that, in the intermediate time, Sir William Wynne expressed an opinion decidedly hostile to the principle on which these cases had been adjudged, when the subject was indirectly brought to his notice in the case of *Netherwood v. Wright*;—as if the obiter dictum of a judge could be taken as affording any fair criterion of what his opinion might be when a subject of this nature should be brought before him,—or as if it were probable that any judge would on an incidental point step out of his way to give a decision on a question of this magnitude and importance.

Fortunately, however, we have the advantage of knowing what Sir William Wynne's(a) opinion really was on this subject when his mind

(a) Now, under these circumstances, it appears clearly that the deceased, after having written the two papers which remain entire, executed two further wills, one in the year 1781, the other in the year 1798; but that these regularly executed instruments are each to the same purport, each to the same intent, as far as the two papers F. and G. go to make provision for the wife, and for the other relations who are there mentioned, it appearing clearly that the deceased's intention was in the first place to die testate; and, secondly, that substantially the intention of the deceased was to do that which he has done by the two papers F. and G. I should be extremely loth to find myself bound by the practice of the Court to establish as to those two papers, containing, as I think they clearly do, and are proved to do, what was the intention of the deceased down to the last of his testamentary life, owing to its appearing that there were testamentary papers afterwards cancelled;—that they must be considered as revocations of these two testamentary papers, I should be extremely unhappy if I felt myself bound so to pronounce;—but I think I am not;—it appears to me, that all the cases in which that decision has taken place have gone upon the ground that there were differences,—that there were departures, and that what was the intention in the first paper was cancelled in the latter. I take it, by the civil law and the practice of this Court, a paper of a later date, containing a different disposition, would be a revocation of the former; and that, though the latter did not appear, and the former did, and was left;—it should require some account, or some declaration of the circumstances, in order to give it effect.

Now I think, in all the cases in which it has been held, that the former will was revoked by the cancellation of the latter—in all the cases I have looked into at least, it appears that the intention of the deceased was varied; consequently, there was proof that he departed from the intention of the first paper.

In the case of *Helyar v. Helyar*, the first will was in the year 1742. William Helyar, the deceased's nephew, was the executor;—the deceased after that made another will, by which another person was appointed executor, and the latter will did not appear; but there was proof that the deceased declared his dislike to the marriage of William Helyar, who was the person appointed executor in the first will; that he declared that he had left him 40,000*l.*, but that he would not leave him a farthing;—from thence the Court concluded that the second will was inconsistent with the former, and on that ground revoked it.

In the case of *Jennings v. Whitehead*, the first will was in May, 1711;—by that he appointed his nephew, Henry Whitehead, executor and residuary legatee;—in 1713, he made another will, appointing his wife executor;—in that same year, in a passion, he burnt his second will. The will with the residue to Richard Whitehead still continuing in existence, he afterwards sent for an attorney to take his instructions for a new will, who asked him whether he had again receiv-

was immediately addressed to it in the case of *Passey v. Hemming*,—he there states as the ground of the decision, that it appeared clearly, both that the intention of the deceased was to die testate; and, secondly, that he always meant to do in substance that which the papers propounded would carry into effect;—expressions which surely do not convey the idea that his opinion was in opposition to that series of cases which had been determined by his predecessors; indeed, from the perusal of his judgment in that case, it is manifest that, entertaining the opinion he did as to the particular case immediately under his consideration, he nevertheless felt the greatest anxiety not to depart from the tenor of those decisions, or to decide any thing which might even in appearance indicate an opinion adverse to the great authorities which had preceded him.—This point was much laboured by him throughout the judgment. *Passey v. Hemming* has been pressed against us as conclusive;—but that was a case decided upon its own special circumstances;—several wills were before the Court in a cancelled state; in all of them the testator had constituted his wife executrix, and given her the residue;—his affection to her was not shown to have been changed, —and the benefit to her was the characteristic feature of the will which was established. It may be observed also, that *Hemming's* case was decided by a very thin commission of Delegates;—and that the judgment of the Court below appears to have been much influenced by an erroneous statement of Lord Alington's case.

The Counsel for Mr. Thomas Moore objected, That it was not regular to allude, in reply, to a case which had not been before introduced into the argument.

Per Curiam. Mr. Justice Park.

I think, in this instance, the allusion is justifiable;—we have all been furnished, and very properly, with a copy of the judgment in *Passey v. Hemming*, in which Lord Alington's case is peculiarly referred to.

Per Curiam. Dr. Arnold.

It is very material that the circumstances of Lord Alington's case should be correctly stated; certainly, in *Hemming's* case there was a complete misapprehension of them.

Argument resumed.

Lord Alington died in 1722(a); the will propounded was dated in 1685. It was stated in the argument on *Hemming's* case, that there was clear proof before the Court that Lord Alington had made another will within a few years of his death, in which Sir John Jacob was executor, containing a wholly different disposition of his property, but that this latter will could not be found;—and that it was on this point that the case turned.—On investigation, however, of the proceedings, it appears that there was no proof whatever before the Court of any second will ever having been completed;—nor could the case have turned on this point;—several inceptions of wills with revocatory clauses were produced;—and the question was, whether these inceptions of wills,

ed his nephew into favour. To which he replied, No, very far otherwise. Here was the clearest proof that could be, of a departure from the first will; and, therefore, the Court pronounced against the first will. *Cited from Manuscript notes of Sir WILLIAM WYNNE's judgment in the case of Passey v. Hemming.*

(a) The cause was entitled *The Duke of Somerset v. Sir John Jacob*, Deleg Jan. 22, 1725.

coupled with length of time, and great change of circumstances, would amount to the revocation of a will;—and the Court decided in the negative.

The result of the consideration, and comparison of all the decided cases appears to be;—that the presumption at common law is in favour of a revival,—and the presumption in the Ecclesiastical Courts is against a revival;—but that either presumption may be rebutted by circumstances.

It has been said, however, that in all the cases where the making of a second will has been held to revoke a former will, there has been in the second a different executor, and a different disposition of the property; from which circumstances the change of intention it has been argued must necessarily have been inferred. To us it appears that the present is a stronger case than any one of those yet decided, from the very circumstance of the same executor being appointed in both the instruments;—because, if it is once admitted that the deceased cancelled her second will from the aversion she had conceived towards her executor, and from her determination that he should not be entrusted with the management of her affairs, is it likely that she should intend to leave in force another will of nearly similar import, in which she constituted the same person her executor, and bequeathed to him the bulk of her property?—A., in fact, is the preparation for B.;—it is the substratum of it.—A. is informal and unsolemn; B. is regular and solemn, and contains a direct revocatory clause.

With respect to the cancellation,—this must be considered as the rock on which the counsel on the other side have split;—to explain it away, they have been driven to resort to irrational and contradictory theories; it has been argued by one as the result of accident, by another as the effect of design;—one has maintained that the deceased took great care not to cut through the attestation clause, while another has laboured to show that not having the attestation clause before her eyes, she accidentally and inadvertently cut through it.

The passage from Swinburne has no application whatever to the present case;—it merely goes to this, that if a will is not advisedly cancelled, even though it be cancelled and blotted in its most essential parts, it is not to be considered in law as cancelled;—our argument is, that being found in the possession of the testatrix, if erased, it must be presumed to have been erased by her; *prima facie*, it is mutilated; and it is for the party claiming benefit under the instrument, to show that the mutilation was accidental.

Again, we have been told, on the authority of Ainsworth's dictionary, that "*concido*" means to cut in small pieces; and, consequently, cannot apply to the species of cancellation which this instrument has undergone; we do not deny this meaning of the word, but we deny that it is the only meaning of it; and we assert that in the passage cited from the Digest, the construction of it is not limited to this signification. It is not so that the commentators have interpreted it. The glossary of Cujacius on this passage is, "*irritum fit etiam testamentum si deleatur vel incidatur.*" And Voet^(a) understands *concidit* in the same sense. An autem consultò, an inconsultò ac præter testatoris voluntatem deletio, *incisio*, similiaque contigerint non juris, sed facti quæstio est. And

(a) Voet ad Pandectas, lib. 28. tit. 4.

again, *consultò tabularum incisio, vel inductio aut cancellatio facta credatur, donec contrarium probatum fuerit.* But if we are not to refer to commentators, but to dictionaries, Facciolati, who is of the highest authority among compilers of this class, states *concidere* in one sense to be synonymous with *abrogare*; and refers to this identical passage in the Digest as an example of such an use of the word.

No explanation then having been given of the cancellation, it must be presumed to have been done *animo cancellandi*;—on the face of it it is most carefully done, and has all the appearance of design;—the law cannot resort to fanciful suppositions in opposition to such an act;—we admit the act to be equivocal, and that the presumption might have been rebutted,—but we contend that all attempts to rebut it have failed.

Thus stands the argument on the documentary evidence;—but when reference is had to oral testimony to show that Mrs. Moore did not consider B. as cancelled, and that her affection to her son Thomas continued unabated till her death, the facts established by evidence utterly refute any such notion.

Mr. French shows his impression of what the deceased's intentions were, by the reasons he gives for not having, according to her request, sent Mr. Butler to her:—all the witnesses speak to her displeasure, her dissatisfaction, and her acrimony, (these are their expressions) at her son Thomas's marriage;—to the bitter reproaches and opprobrious epithets she lavished upon him, to her declarations that she now considered herself as having no relations; and above all, there is clear testimony of the anxiety she expressed, to the latest moment of her life, to see Mr. Butler, for the avowed purpose of making a new will. It is in vain, in opposition to such stubborn facts, to argue that her letters begin and end with those expressions of affection and endearment, which a mother usually employs when writing to a son;—that her anger was only occasional, and that she never seriously came to the resolution of making a new will.

The sum of the argument is, that there is clear proof of the cancellation of B., that from the facts and documents before the Court, it is equally clear that if she intended to revoke A. she must be presumed to have intended at the same time to revoke B.; and though she might not and probably did not intend to die intestate, yet it is obvious that neither of the wills before the Court contain the disposition she intended to make of her property; whatever that disposition might have been, it would probably have been inofficious. It may be some satisfaction, therefore, to the Court, (if it is permitted to courts of justice to feel satisfaction on such subjects,)—that the only conclusion of law at which it can arrive is, to pronounce for an intestacy, since there can be no doubt but that such a sentence will make a more just disposition of the property of this unhappy lady, than she, if she had lived a short time longer, would herself have made of it by will.

The Judges Delegates affirmed the sentence of the Prerogative Court of Canterbury; but gave no costs.

PREROGATIVE COURT OF CANTERBURY.

JOHNSTON v. JOHNSTON.—p. 447.

The birth of children, combined with other circumstances, will revoke the will of a married man.

JAMES JOHNSTON made a will on the 21st of July 1793;—he was then resident in the island of Jamaica, and had two children, a girl and a boy, and his wife was pregnant. By this will he bequeathed “10,000*l.* to his daughter, 10,000*l.* to the child of which his wife was ensient, and if more than one, then 10,000*l.* to each, and the residue of his property to his son.” He quitted Jamaica shortly after the making of this will, and returned to England, where he continued to reside till his death, which happened suddenly, on the 3d of July, 1815, at his house in Wimpole street; he had four children born subsequent to the date of his will; and his personal property at the time of his decease amounted to nearly 300,000*l.* His widow was possessed of a considerable landed estate in fee.

The will of the 21st of July, 1793, was propounded by the widow, who was one of the executors under it. The three youngest children, who were minors, appeared by their guardian, and prayed an intestacy.

At the time of the deceased's death, the will of the 21st of July, 1793, was in the custody of his agent in Jamaica; but in the pigeon-hole of an *escrutoire* in the library in Wimpole-street was found a will bearing date June 21, 1793, originally prepared for execution, but afterwards altered in several places by the deceased, and obviously used as a draft for the will of July 21, 1793. There was also found within the blotting paper leaves of a writing book in the same *escrutoire*(a) the sketch of a will in the deceased's own handwriting, without date or signature, written on the back of a printed letter from the West India dock-house, which letter was dated July 6, 1814. And, lastly, there was in the same *escrutoire* a will made prior to his marriage, and dated Charleston, November 30, 1782.

Swabey and *Jenner* in support of the will, cited *Swinburne*, Part VII. s. 15, title “Of revoking the Testament;” *Overbury v. Overbury*, 2 Show. 253; *Lugg v. Lugg*, Salkeld, 592; *Meredith v. Meredith*, 1710; *Ward v. Philips*, Prerog. 1732. Deleg. 1734; *Shepherd v. Shepherd*, 5 T. Rep. 49; *Combe v. York*, Deleg. 1738; *Noel v. Noel*(b); *White v. Barford*, 4 Mau. and Selw. 10.

Adams and *Lushington* contra, for an intestacy, cited *Wells v. Wilson*.(c)

Swabey and *Jenner* in reply.

JUDGMENT.

Sir JOHN NICHOLL.

This is a case certainly of much importance, both to the parties, and

(a) This paper was propounded in the Prerogative Court on the 26th of June, 1816, as the last will of the deceased; but the Court held, that it could not be entitled to probate. It was marked with the letter C. in the registry of the Court, and is the paper referred to under this denomination, in the arguments of the counsel, and the sentence of the Judge.

(b) Referred to in the case of *Parsons v. Lanoe*, Ambler, 557.

(c) Mentioned in Sir George Hay's judgment of the case of *Shepherd v. Shepherd*, T. R. Vol. V. p. 49.

as involving a question of law of great extent and consequence. I have considered it with all the attention and circumspection in my power; and I now proceed to the decision of it with much anxiety, and a painful sense of the responsibility that belongs to it.—My chief consolation, however, is, that if the judgment I am about to give should be erroneous, it may be corrected by a superior tribunal.

The question of law involved in this case, and to which I have referred, is, whether a will made by a married man having certain children, is revoked by the subsequent birth of other children left unprovided for, aided by other circumstances concurring clearly to show (if such should be the result of facts) that it was not the intention of the deceased that the will should operate.

I will first advert to the facts of the case, observing upon their effect as I proceed, in order to arrive at their true result; and I shall then consider the question of law.

The facts themselves admit of no controversy;—they are not involved in contradictory and conflicting evidence. They are stated in the plea, and are admitted in the answers.—The testator, Mr. James Johnston, died upon the 3d of July, 1815, at his house in Wimpole-street, leaving behind him a wife, three sons, and three daughters; one daughter being married, one son and two of the daughters being minors, which son has come of age since the commencement of the suit, and now appears in his own person.—The deceased left personal property, amounting to upwards of 200,000*l*.—There was also a real estate in the West Indies settled upon him, and his wife in survivorship in fee.—The deceased several years ago resided with his family in the island of Jamaica. In the month of June 1793, being about to return to England, he made, and duly executed, the will in question, a very few days before he sailed. The prospect of the voyage was probably the incitement to make the will; but there is nothing in the instrument itself, nor is any sufficient evidence laid before me, to render the validity of the will in any degree conditional and contingent upon the event of the testator's safe arrival in England.—I am of opinion, therefore, on this part of the case, that the will remained valid after the arrival in England of the testator; and that, unless it has been revoked by subsequent circumstances, it now remains valid.

At the time of making this will, the testator had two children, a son and a daughter; and his wife was then supposed to be ensient.—It is admitted in the answers, that his personal property at that time amounted to no more than from ten to fifteen thousand pounds, and his wife was provided for by the settlement of the real estate already mentioned.

Now, by the will in question, he gives 10,000*l*. to the child of which his wife was then ensient;—if more than one child, 10,000*l*. to each of them:—the residue of his real and personal property he gives to his son, and, in the event of his dying without issue, he gives certain legacies.

Let me here pause, in order to look at the principle of this will, and at the effect which it now would have if valid.—The principle or character of the deceased's testamentary disposition of his personal property (if I may so express it,) is to provide amply for his younger children;—he is so anxious to discharge that duty, that he provides for the child or children of which his wife might then be pregnant.—Even if there

should be only one child born, (which was the case) the whole personalty would be exhausted, and the eldest son would have nothing but the real estate.

Such would have been the effect of the will, and such was the intended disposition, if the deceased had died soon after his arrival in England.—He, however, lived above twenty years afterwards, and had three other children born besides the one of which his wife was pregnant when he made his will;—and his personal property had increased to upwards of 200,000*l*.—The effect then of the will at his death under the residuary clause is to carry 180,000*l*. of the personalty to the eldest son, in total exclusion of the three youngest children, who will be left entirely unprovided for, and even in great disproportion to the other two children, of one of whom his wife was ensient at the time of making his will. This effect is totally inconsistent with the principle and character of the testator's intentions at the time of making his will.

It is also admitted, that this will was left in the hands of one of his executors, or his agents in Jamaica;—it was handed over from one agent to another, as they severally succeeded to the situation, but it was never in the possession of the deceased himself;—it is admitted that he brought over with him no duplicate of this will, he did not execute it in duplicate.—He did, indeed, bring over a draft or corrected copy of the will;—and in the year 1798, he received an inventory of the papers which he had left at Jamaica, one item of which inventory is in these words:—“Under an open cover addressed to Alexander Wright, Esq. is a sealed paper in form of a letter, which was received by Mr. Landale from a Mr. Forsyth;—on the sealed paper is written, in Mr. Johnston's hand-writing, ‘not to be opened till certain accounts are received of the death of James Johnston.’”

The draft of the will, and this inventory, were found together in the deceased's *escrutoir*, where he generally wrote. Now, from these circumstances, and from the conversations with his wife, to which I shall presently refer, though there is no reason to conclude that the deceased had neither forgotten that he had made such a will, nor supposed it was no longer in existence; yet still the will was not in his possession, so that he could at any time cancel or burn, or otherwise destroy it.—He could only do that, by sending for it to Jamaica, or by sending directions there to destroy it, to which he might not choose to trust.

It is farther admitted, that for these after-born children the deceased showed an equal degree of affection, as for those provided for by the will. The youngest son was placed with a merchant, with a view to his establishment with the deceased's assistance in a mercantile house; so that there is every reason to suppose, both from the presumed sense of duty, as well as from his actual conduct and affection towards these children, that he did not intend to exclude them from a provision after his death.

It is also admitted that the deceased at all times, and especially during the latter parts of his life, was very reserved respecting his property, and testamentary intentions; and was very reluctant to enter upon the subject, even with his wife:—when she commenced the conversation he seemed rather displeased;—yet, notwithstanding this disinclination, she did at different times, and as fit opportunities occurred, suggest to him the propriety of his making a will, representing to him that, according to the will made at Jamaica, the younger children would be

left unprovided for;—that the deceased on some such occasions answered generally, “*that there was time enough for making a will, he would take care of that;*”—now here is not the least appearance of approbation of, or adherence to, the will in question, in these conversations;—where the wife represents that the younger children will be utterly unprovided for. He does not in the most distant manner intimate, what has been thrown out in argument, that as his wife in case of surviving him would have the real estate, she might have an opportunity of providing out of the real estate for younger children. Such a thought seems wholly inconsistent, indeed, with the will itself, and with the whole of his conduct, and seems never to have entered his imagination. So far from his having the slightest intention that the Jamaica will should operate, he accedes to the representations of his wife, as to the propriety of making a new will; he merely procrastinates, and says, “*that it is time enough to make a will, but I will take care of that.*”

It is further admitted, that Mrs. Johnston on one occasion mentioned to the deceased, what the consequences to his family would be if he died without having made a new will; when he replied in general terms, “*that the law made the best will for a man.*”

Certainly, parol declarations are always to be received with very great caution;—in general, they are the lowest species of evidence; though in this Court upon questions of factum, and also upon questions of revocation, the declarations of the deceased are always received as corroborative evidence of intention,—both of the animus testandi, and the animus revocandi. The loose declarations which a man often makes in conversation with his friends and acquaintances are of very little weight indeed. They may, on the part of the testator, be insincere, or at best the mere passing thought of the moment, and are liable on the part of witnesses to be misapprehended, and misrepresented. But these confidential communications with his wife upon her serious representations to him respecting so important a subject, are deserving of rather more weight as evidence of the deceased’s mind and intentions; and, judging from those declarations, he does not seem to have had any strong objection, even to an intestacy; for upon her enquiring whether he intended to make a will he answered, “*that the law made the best will for a man.*”—Yet, even upon these declarations the Court would be cautious in placing much reliance, if they were not confirmed by something more unequivocal and solid coming from the deceased himself in a different shape, and not open to any of the same objections.

There is before the Court a paper marked C. written by the deceased, certainly within the last year,—possibly at a later period, of his life.—A paper which if it could have been shown that it was written at a very short period indeed before his sudden death, (as might possibly be the fact) might have prevented the whole of the present question;—for in that case it might have been established as a will, and in its effect it would be completely revocatory of the present will.—Paper C. is in these words, “*Whitehall estate, in the parish of St. Mary’s, with the negroes, stock, &c. is settled on J. Johnston and Mary Ballard Beckford, his wife, for their joint lives, and to the survivor of them. If, therefore, I should survive my said wife, I give, &c. the said estate, &c. to my eldest son James Johnston;*”—there are then some words struck through; then follows:—“*in the event of his dying without issue, to Robert Ballard Johnston, my second son; and in the like event as to*

him, to my third son William Clarke Johnston, their heirs, &c. subject to the payment of legacies; to my other children, in equal shares, to the following amount, that is to say, to each of my said children, Robert Ballard, William Clarke, Mary Beckford Bevan, wife of Charles Bevan, Esq., Eliza Johnston, and Helen Johnston, and their respective executors and assigns, the sum of out of my said estate, besides the respective shares of my money in the funds, as hereafter mentioned. I give to my brother David Johnston, if he should survive me, and if not, to such children of his as shall be living at my decease, the sum of

And to my sisters Jane Johnston and Eliza Johnston, the sum of and to my sister Helen Carruthers, if she survived me, and if not, to her children equally, as in the case of my brother David's children, the sum of ;" there is a mark with a caret, which refers to a clause at the end, intended to come in here;—"and I give to my said wife, if she survive me, and if not, to my son James, &c. the house in Upper Wimpole-street, in which I now live, with the furniture, plate, horses, carriages, &c. which I shall die possessed of; and to my friends, Patrick Lynch and J. H. Deffell, and to each the sum of and all the residue of my property to be equally divided between such of my said children as shall survive me, share and share alike; and I appoint executrix and executors of this my will, my dear wife, Mary B. Beckford, if she shall survive me; my son James Johnston, or the eldest of my sons, that survive me; my brother David Johnston, and my friends Patrick Lynch, of the island of Jamaica, Esq. and John Henry Deffell, of the city of London, merchant."

These are the exact words of paper C.; and this paper is written upon the back of an old letter, which was dated the 6th of July, 1814, so that it must have been written after the date of that letter. The deceased died in less than a year afterwards, namely, the 3d of July, 1815. This paper for the reasons assigned by the Court, when it was propounded, could not operate as a new will: not being valid as a dispositive paper, it is not *per se* valid as a revocatory paper: but is a circumstance of evidence tending to show that the deceased did not mean the will made at Jamaica to operate; and it is extremely strong. In its principle of disposition, it is the same as the Jamaica will; but in their effect the two wills, from the change of circumstances that had intervened, would be very different indeed. By paper C. the whole of his personal property is to be divided equally among his children. The eldest son, so far from taking the residue 180,000*l.* of personalty to the utter exclusion of the three younger children, and in great disproportion even to the other two, would take only the real estate in tail, and subject to the payment of legacies to the other children; the amount of which legacies is left in blank. This approaches, therefore, very nearly to an intestacy: for though the widow was not intended to have her distributive share, as she was provided for by settlement; yet she was to take some benefit under the will; the house and certain effects in Wimpole-street, are left to her; and she had in no degree lost the affection of the deceased, for she is appointed to be his executrix.

Now this paper proves, in some degree, the sincerity of the deceased's declarations, "*that the law makes the best will for a man;*" not meaning, however, himself literally to die intestate, for it is clear he meant to make a will: his declarations are, "*there is time enough to*

make a will, but I will take care of that;”—but still it shows that it was not the intention of the deceased to depart very far from that disposition which the law would make of his property.

Lastly, it is admitted, that the deceased died suddenly of apoplexy, having this intention of making a will; but from indolence, from procrastination, or possibly from not having made up his mind as to the amount of the legacies with which he should charge his real estate, while he is thinking there is time enough, he is suddenly overtaken by death, in the manner stated.

Such are the facts of the case.—The result of them so far as respects the intentions of the deceased to revoke, can hardly, I think, admit of question: there is not the slightest circumstance of a contrary bearing. If the deceased had had this will in his own possession, and had not cancelled it, as he did the other old will in his possession, that might raise an inference that he intended it should operate till he had made a new will.—If, when his wife conversed with him, he had expressed any adherence to this will, or any substitution for it;—such as a desire that she should provide for those younger children;—if he had left the residue to her, and thereby devolved upon her the duty of providing for those younger children, by giving the bulk of his property to her, that circumstance might have raised a similar inference: but his answer negatives all these suppositions.—It is, “there is time enough to make a will, but I will take care of that;”—if, notwithstanding those declarations, he had done nothing,—he had taken no steps, some doubt might have been raised;—but he does write this paper. If this paper had been the mere inception of a will, or if it had shown an intention to give a very large portion of the personal estate to the eldest son, it might in some degree appear confirmatory of the will at Jamaica; and, adhering rather to the effect than the principle of that will, it might have raised some doubts whether he had made up his mind to revoke the Jamaica will.—But the paper C. is the very reverse of all this in its disposition.—Again, if, notwithstanding the writing of this paper containing such a disposition, the deceased had had a long illness; had been aware of his approaching death, and yet had taken no steps, nor expressed any desire to make another will; such a circumstance might have carried some inference adverse to revocation;—but he died suddenly of an apoplexy.

Looking then at the different papers,—attending to the bearing of all the circumstances,—seeing that they are all set in one direction,—endeavoring also to divest myself as much as possible of any impression arising from the hardship of the case upon the younger children, and looking solely to the just result of the circumstances upon the mere question of fact as to the intentions of the testator, it is the clear moral conviction of my mind, that the deceased had not any intention whatever, at the time of his death, that the will made at Jamaica, which is propounded in this cause, should operate.

But the question still remains whether, in point of law, these circumstances, and this result, amount to a revocation of the will.

The general rule certainly is, that a will once executed remains in force, unless revoked by some act done by the testator, *animo revocandi*; such as burning, cancelling, making a new will, and the like.—Swinburne lays it down in the passage which was quoted, and read by the counsel, that length of time, increase of wealth, prejudices to re-

lations, or, as he expresses it, to *those in administration*, all concurring, will not revoke.—If a will be made on account of sickness, yet it is not revoked on recovery;—though it be made on account of a journey, it is not revoked by a return.—He adds, “*if a testator, after making a testament, should have a child born, I suppose the testament is not thereby presumed to be revoked, especially if the testator live a long time after the birth of the child, and might have altered the testament, and did not.*” He then puts several cases where revocation shall be presumed, such as the executor becoming the enemy of the testator, and two or three other cases, which are certainly not law at the present day:—Swinburne, wrote in the latter part of Queen Elizabeth’s reign; the Statute of Frauds (29 Charles 2.) enacted some new positive rules, not only in respect to the factum of wills, but in respect to the revocation of wills:—but since that statute there have been several cases decided of *implied* revocations, many of which have been cited in argument.—Under those various cases several points are now settled which may be stated without reference to the particular cases themselves in which they were so decided;—first, that implied revocations are not within the statute of frauds;—secondly, that a marriage and birth of children do together amount to an implied revocation;—thirdly, that marriage, without birth of children, does not amount to an implied revocation; fourthly, that the subsequent birth of children is not alone and without other circumstances an implied revocation.—But the point remaining for consideration is, whether the subsequent birth of children accompanied by other circumstances such as those in the present case, and leaving no doubt of intention, will or will not raise the implication of law:—or, in other words, whether the circumstance of subsequent marriage concurring with the subsequent birth of issue is an essential ingredient;—a *sine qua non*, in order to produce an implied revocation.

Now to solve this question, it is necessary to trace this rule (if it may be so called) with respect to implied revocations up to its origin, to see upon what authority the rule stands, and upon what principle it is founded.—The importance of the present question requires that this should be done, and in detail.

A presumptive revocation of a will arising from marriage and the birth of a child is not mentioned, as far as I am aware, by any ancient text writer upon the law of England as a part of our English jurisprudence; nor, as far as I am informed, was it a part of the ancient jurisprudence of any other country.—It is not mentioned as a rule existing in Swinburne’s time; nor is it enacted by the statute of frauds, or any other statute.

The first reported case in which this rule was applied, is, I believe, that of *Overbury v. Overbury*.—That was a case of personal property;—and after that the case of *Lugg v. Lugg* in 1696,—*Meredith v. Meredith*, 1711,—and many other cases of personal property, occurred. It was, however, not finally admitted as a revocation of a will of real property, until the year 1771, in the case of *Christopher v. Christopher*, cited in 4 Burrows, 2132, in the Exchequer;—in that case one of the judges was dissentient, thinking the words of the statute too strong to be got over. Certainly, the words of the statute are very strong, that “*no devise of lands shall be revocable, except*” by certain modes prescribed by the statute, “*any former usage to the con-*

trary notwithstanding." No words can be well more clear than these words; but, strong as they are, the judges ventured to get over them,—so far as to consider the case out of their operation; and the decision in that case has been adopted in other cases, and has been approved by other judges. The rule then of revocation by marriage and issue stands, in point of *authority*, not upon any ancient rule of law;—not upon positive enactment; but as the result of decisions of courts of justice, even against strong words of positive law; yet founded certainly, in my apprehension, on sound principles, and in order to arrive at substantial justice.

Having thus considered the authority upon which the rule stands,—I will next examine the nature and extent of the rule. It is not an absolute, it is only a presumptive, revocation; and this presumption, or presumed intention to revoke, may be rebutted by other evidence. Some questions have arisen as to the species of evidence to be let in.—The evidence of circumstances has been admitted in all Courts, and in all cases.—In this Court parol declarations have always been admitted in concurrence with other evidence.—Doubts upon the admissibility of parol declarations have been raised in courts of common law; Lord Mansfield, in the case of *Cubit* and *Brady*, Douglas, p. 38, was decidedly of opinion for their admissibility; but in all cases circumstances tending to rebut the presumption have been received.

It may be proper to refer very briefly to some of the cases in which the presumption has been considered as rebutted. The case of *Brown v. Thompson*,^(a) was the case of a will before marriage, made in favour of a woman whom the testator afterwards married, and by whom he had afterwards a posthumous son;—and it was held not to be revoked by such marriage and issue, upon the ground that the will made a provision for the wife, and through her for the son.

In *Cubit v. Brady*, Lord Mansfield lays it down "that a subsequent marriage and the birth of a child affords a mere presumption;—there may be many circumstances where a revocation may be presumed. The case in Cicero^(b) is an old and well known instance of such presumption;" and Lord Mansfield there is made to say further, "I do not recollect any instance in which marriage and the birth of a child have been held to raise an implied revocation where there has not been a disposition of the whole estate. The testator disposed of a small part of his estate in charity; then in contemplation of his marriage, he settles 600*l.* a year on his intended wife, with remainder to himself in fee; it is clear therefore, that he contemplated the change in his situation, and provided for it as to his wife; and with regard to the children he will be supposed to say, I will keep them in my own power;" he goes on and says, "I am clear on the other ground;" the admissibility of a parol declaration, "that this presumption like all others may be rebutted by every sort of evidence." In this decision the other judges concur; and

(a) *Brown v. Thompson*, 1 Equity Cases Abridged, p. 413.

(b) *Quæ potuit esse causa major quam illius militis? de cujus morte, cum domum falsus,—ab exercitu nuntius venisset, et pater ejus re creditâ testamentum mutasset, et quem ei visum esset, fecisset hæredem, essetque ipse mortuus: res delata est ad centumviros, cum miles domum revenisset, egissetque lege in hæreditatem paternam testamenti exheres filius.*—Cicero de Oratore, lib. 1. c. 38.

Mr. Justice Buller, in the conclusion of his judgment, says, "implied revocations must depend on the circumstances at the time of the testator's death."

The case of *Kenebel v. Scrafton*, 2 East, 530, was that of a will made in contemplation of marriage; and, by the birth of children after marriage, the Court held it was not revoked. Lord Ellenborough says in that case, "upon whatever grounds this rule of revocation may be supposed to stand, it is on all hands allowed to apply only to cases where the wife and children, the new objects of duty, are wholly unprovided for, and where there is an entire disposition of the whole estate to their exclusion and prejudice.—This cannot be said to be the case where the same persons who, after the making of the will, stand in the legal relation of wife and children, were before specifically contemplated and provided for by the testator, though under a different character."

In the case *Ex parte Lord Ilchester*, 7 Vesey, Jun. 348, a disposition was made in favour of the children of the first marriage: the testator afterwards married, and had children of that marriage; but that was held not to revoke the will, upon the ground that the children of the second marriage were provided for by the settlement.

In the case of *Sheaf v. York* before the Rolls, the question arose on a devise of the real estate to the children of a first marriage; and it was held not to be revoked by the subsequent marriage and issue, because the children of the second marriage would derive no provision, since the whole real estate would descend in case of intestacy to the son of the first marriage; consequently, the revocation of the will, as to the real estate, would not furnish any provision for the children.

I will only mention one or two cases out of these Courts.—In the case of *Thompson* formerly *Myall v. Sheppard and Duffield*, Prerog. Trin. Term, 1782, before Dr. Calvert, it was held that though there was marriage and the birth of children after making the will, yet that the presumption was rebutted;—he concludes his judgment in these words, "*the facts thus operating against the presumption, I must pronounce it to be the will of the deceased.*" So again in *Wright v. Samuda* in 1793, before Sir William Wynne.—The testator gave some legacies, and then gave the residue of his fortune to his wife; she died, and he married again, and had other children; Sir William Wynne after stating, "that there was no difference between the will of a bachelor, and the will of a married man, or widower with children, as to revocation;" yet held that under the circumstances the presumption was rebutted, and the will was still a valid will. In the case of *Calder v. Calder*, Sir William Wynne laid it down "that marriage and birth of children is a presumptive revocation, but the contrary may be shown, and the presumption be rebutted;—declarations of the deceased are admissible, not to revoke a will, but to explain the intention."

In all these cases, and in several others, the will is not absolutely revoked, though followed both by marriage and issue. On such questions, whether it be to examine if the presumption be raised, or whether it be to examine if the presumption be rebutted, the Courts do always inquire into all the circumstances of the case.

What, then, is the true sense, and sound reason, and foundation, of the rule itself? In looking through the several cases, the foundation upon which the presumption stands, as pretty constantly stated, is the alteration in the testator's circumstances between the time of making his

will, and the time of his death. If it stood so general, as a *mère alteration of circumstances*, it would be very loose indeed. If it be added, "*total alteration of circumstances*," it is not much more definite. But if the case be further examined, we shall find that Courts have required such an alteration of circumstances arising from new moral duties accruing subsequent to the date of the will, as by necessary implication creates an intention to revoke. Here then, I think, we touch upon safer ground, and upon more solid principles. Intention is the very foundation and corner stone, the very essence, of all wills. The term "will" necessarily means that it is the *testatio mentis*. Intention is the principle of factum, and of revocation; it is the principle of revocation whether it be direct by act, or implied by circumstances; the *animus testandi* or *revocandi* is the governing principle. By Courts holding that marriage and the birth of children are not an absolute revocation, but only an implied revocation; by their inquiring, in the manner I have already stated, into all the circumstances, it is quite obvious that they examined into and endeavoured to get at the real intention:—but it might be opening too wide a door, if this enquiry were to be directed to every change of circumstances. Those loose rules which prevailed in Swinburne's time, are no longer admitted. Courts have, therefore, required that the rule shall have for its basis a change of intention, produced by, and to be presumed from, some new moral obligation arising after the will was made; marriage and issue are supposed to produce those new moral duties; every man is presumed to intend the making of a provision for his family.

Having thus arrived at the true foundation of the rule, the question remains to be considered whether both circumstances are required to concur; whether the rule has been so limited, as that *subsequent marriage* is an essential requisite. Now I cannot help thinking that upon plain reason, and upon substantial justice, it should seem that the concurrence of marriage is not an essential part. The birth of children, after making a will by a married man, may have imposed as strong a moral duty upon him, forming the ground work of presumed intention, and may be accompanied by circumstances furnishing as indisputable proof of real intention, as if the will had been made previous to the marriage. Marriage alone may possibly stand upon a different foundation and footing from after born issue. Marriage is a civil contract; the wife may make her own conditions before marriage in order to provide against the negligence or injustice of the husband:—marriage settlements are usual:—The law, out of the real property, makes a provision for the wife by dower. If she enters into the contract, and takes no precaution of this sort, she takes her chance either of the husband providing for her, or of providing for herself. But after-born issue are parties to no contract; they come into the world entirely dependent upon the parent; and if it is the legal duty of a father while living to maintain his children, so it is a strong moral obligation upon him not to exclude them from a provision after his death. It is true he has a right to do it; though at one time, at least in particular districts, he had not the right of excluding them,—the law did not allow him to dispose of his whole property; at present he may if he pleases, and the law can afford no relief; but by moral obligation there is a strong foundation laid for presuming that he did not intend to exclude them. In point then of true reason and sound sense the concurrence of subsequent marriage is not essential in all cases. The circumstances of this very case in the most forcible manner do, I think, illustrate the truth of this position.

It must, however, be enquired in the next place, whether the authorities and the adjudged cases have held marriage to be an essential requisite.

It appears from the first reported case, as well as from what has been stated in subsequent cases, that the rule was originally borrowed from the civil law. The civil law is certainly no binding authority in this country;—it is received where the law of England is silent, and where it is not at variance with the spirit and principles of the law of England; and when it furnishes a sound rule of equity and substantial justice: at all times, however, it has been adopted with great caution and jealousy.—Yet, so far as the rule in question has been borrowed from the civil law, it is quite clear that marriage, far from being an essential to that rule, had nothing to do with the subject. By the civil law the matter stands upon a different footing;—it is the birth^(a) of issue alone that revokes. But even by the civil law the birth of children revokes upon the principle of presumed intention; for it supposes that the exclusion of children was not intended by the testator. The same notion seems to have prevailed in this country, and has given rise to a common error, existing to this day, that it is necessary to cut off a child with a shilling, or some small sum.

In the next place if we look at our earliest testamentary writer, Swinburne, the result is the same:—treating of an implied revocation, he speaks of cases wherein it is raised, and what circumstances will not raise it;—but he does not mention subsequent marriage as an essential ingredient, or as in any degree applying to the subject. In the passage already quoted, he seems to doubt whether by the law as it was then understood the birth of children would or would not revoke;—“he supposes”—that is the way in which he qualifies his expression—“*he supposes it would not,*” especially if there were circumstances tending to show an adherence to the will. His words are—“if the testator live a long time, and might have revoked the testament, and did not, the rule of the civil law that the birth of issue revokes would not avail.” And so is the rule at present;—the mere circumstance of subsequent birth of issue, without any other circumstance, is admitted not to revoke; it has been so adjudged: but as to subsequent marriage, Swinburne does not in any manner advert to it.

I come now to the adjudged cases. The first to which the attention of the Court has been called, is that of *Wingfield v. Comb*, in 1669, Cases in Chancery, 16, which not being a question of revocation, is not mentioned as having much bearing upon the point. The case reported is to this effect—A. having a son and other children, married again;—five years before he died he made a will; taking notice therein that his wife was ensient, and giving to the child en ventre sa mere 1000*l.* if a daughter, and 100*l.* a year if a son, to be settled upon him and his heirs male; and if the son died without issue, then to the plaintiff. The wife was brought to bed of a son, and this son died in the lifetime of the father;—the testator died leaving the wife ensient with a daughter to whom no portion was left or other provision:—the Lord Chancellor

(a) This was the law of Rome from a very early period:—In Cicero's time, we know that the point was considered so settled as not to be arguable.—Num quis eo testamento quod paterfamilias ante fecit quam ei filius natus est, hæreditatem petit? Nemo: quia constat agnoscendo rumpi testamentum.—*Cicero de Oratore*, lib. 1.

Nottingham said, “In case of a devise I cannot help where the law fixeth the estate; but if you come for relief in equity, and there falleth out an unforeseen accident which if the testator had foreseen he would have altered his will, I shall consider of it:”—“here he meant in case he left a daughter born after his decease to have provided for her; and though it happened the wife had no such daughter when he made his will, yet she was ensient at the time of his death;”—the Lord Chancellor then directed a bill to be brought, and that the posthumous daughter should be made a party. This does not seem to be a question of revocation, and therefore does not strictly apply: but it shows the anxiety of the Court to get at the object, and at the intentions of testators; and the circumstance of subsequent *marriage* did not occur in that case.—The Lord Chancellor refers to another case in the course of his judgment: he says,—“A. having only a daughter, devised to trustees to convey to the daughter in fee;—the testator recovered and had a son;—the daughter shall not carry land from the son.”—Here then, if I rightly understand the matter, the after born son revoked the devise to the daughter, which could only be upon the ground of presumed intention.—But here again, as in the former branch of the case, subsequent *marriage* is not an ingredient.

The first case directly upon the question of revocation was that of *Overbury v. Overbury*, in 1684, 2 Shower, 253; and the report is in these words, “upon an appeal to the delegates it was adjudged that if a man makes his will, and disposes of his personal estate among his relations, and afterwards has children and dies, that this is a revocation of this will according to the notions of the civilians, this being an *inofficiosum testamentum*.” In this report it is to be observed, there is no mention whatever of subsequent *marriage* being an ingredient: upon looking into the original proceedings I find that the marriage was also subsequent to the will; but the report shows that it was not understood by the lawyers of that day that marriage was a material circumstance; for so far from its being considered essential, it is not even adverted to in the report. He states the revocation to be founded upon the idea of the civilians that it was *testamentum inofficiosum*; if it was so, it could only be upon the birth of children, for the civil law looks to that circumstance only:—marriage has nothing to do with the subject according to that law.—Here then is the civil law from which the rule is supposed to be borrowed;—here is the opinion of Swinburne; and here is the report of the first adjudged case upon the question of revocation, all concurring in considering the birth of children as the essential ingredient,—and in which *marriage* is in no degree adverted to as a material circumstance.

The next case is that of *Lugg v. Lugg*, 2 Salkeld, 592, 1 Ld. Raym. 441, which happened in the 8th William III.; the report in Salkeld is in these words—“Before a commission of delegates—one being single made his will, and devised all his personal estate to I. S.; afterwards he married, and had several children, and died without other will or dispositions; and now coram delegatis of which Treby, C. J. was one, it was ruled that there being such an alteration in his estate and circumstances so different at the time of his death from what they were when he made the will, here was room and presumptive evidence to believe a revocation, and that the testator continued not of the same mind.” Here both of the circumstances are mentioned,—the subsequent mar-

riage, and the birth of children; but it is put upon the evidence of presumed change of intention arising from change of circumstances, not adverting specifically to marriage as one of the circumstances, but that all the circumstances taken together did amount to presumptive evidence to show that the testator did not continue of the same mind.

The next case which has been adverted to is *Meredith v. Meredith*, Prerogat. 1711; of that case I happen to have two manuscript notes, both in the handwriting of Dr. Andrews. I am not able to ascertain which was first made; but they both state the circumstances of the case to the same effect, and I will read them both at length.—“*Meredith v. Meredith*, 1711. Henry Meredith in 1708 made his will, and therein makes his brother Roger Meredith, his executor; he afterwards marries, and settles the leasehold estate in trust for him and his wife, during both their lives; and after their decease, for his executors, if he makes a will, or administrators, if he dies intestate:—he leaves issue one daughter, and dies.—Among his writings is found the draft of a will, which begins in these words:—“In the name of God, Amen.—I give all my estate in the manner and form following, that is to say, I give to my wife all my plate and jewels,”—and there leaves off. The brother prays probate of the will of 1708; the widow desires administration with the testamentary schedule annexed.—*Per Curiam*.—Sir Charles Hedges decrees administration to the widow, with the testamentary schedule annexed. In *Overbury's* case it was determined that the subsequent marriage and the birth of issue destroys a will made before marriage. The beginning another will shows that he intended the first should not be in force, but was supposed to be revoked by the marriage settlement.” Dr. Andrews, in this report, does not state the question or the grounds of decision very pointedly. The other report is in these words:—“*Meredith v. Meredith*.—The testator left a daughter, and died possessed of a lease of tithes about 100*l.* a year, held under the Archbishop of York;—by marriage articles, this was settled on his wife for life, then to his executors and administrators;—he died at Christmas 1710. Among his papers was found a will dated 1694, and another 1708, in which Roger Meredith, the plaintiff, was executor, and this lease given him; there was likewise an imperfect will, in which the testator gave his wife some jewels and plate, but went no farther. Question if the marriage articles, a child born after this will, and another will began, was not a revocation of that of 1708. Judge of opinion it was,—and founded himself principally upon the birth of the child;—and *Overbury's* case, which had been adjudged in the Delegates, was quoted as an authority, and decreed administration to the widow with the paper annexed.”—Here then Dr. Andrews does state the question: he mentions the circumstances upon which the case was to be decided, and states the ground of decision.

Now there are some observations which present themselves upon these notes.—In the first place, the putting this lease in settlement could only have revoked the will pro tanto;—namely so far as respected the bequest of that lease.—The testamentary schedule could not be a very material circumstance, except as a circumstance of evidence, because it certainly of itself could not have revoked the whole will, inasmuch as it was merely the inception of a new will, and according to every rule the inception of a new will, will not revoke; but as far as it goes, it is to be taken in conjunction with the former will.—The mar-

riage itself could not be a very material circumstance, because there was a settlement made providing for the wife;—but the report says, the judge founded himself principally upon the birth of the child;—that is expressly stated by the reporter as the principal foundation of the decision.—The marriage is not even adverted to;—where he is stating authorities he considers *Overbury v. Overbury* as a parallel case, and seems to have been aware that subsequent marriage had occurred in that case, though the report, in enumerating the grounds of the sentence, does not mention that circumstance;—so that it seems to have been, upon all the circumstances considered together, the birth of a child being the principal circumstance, and marriage not even mentioned, (at least by the learned reporter it was so understood) that Sir Charles Hedges held the will to be revoked in the case of *Meredith v. Meredith*.

The next case adverted to is that of *Ward v. Phillips* in 1734; it is very shortly stated in *Shepherd v. Shepherd*, in the 5th Term Reports. The circumstances were these:—Captain Rowland Phillips died in September 1731, leaving a widow and three children at the time of his death;—no will was found;—the widow had renounced the administration, which was granted to the grandmother of the children;—the widow afterwards married Ward, the plaintiff;—a will was subsequently found in a portmanteau among a parcel of papers;—it was made twelve days after the marriage, and gave every thing to the wife;—evidence was gone into to show that the testator had afterwards a bad opinion of his wife,—that they lived upon very bad terms,—that she had been confined in a madhouse for a very considerable time, and that in the latter part of his life he lived separate. The Prerogative Court appears to have pronounced against this will, not upon any question of revocation, but upon failure of the proof of the factum.—I have looked into the pleadings and evidence; and, as far as can be collected it appears that the opposition was directed against the factum;—it was offered to prove that it was a forgery,—that the testator was abroad at the time the will was made,—that he lived on ill terms with his wife, &c. Thus the original grounds intended to show that he had made no will, and not to raise the question of presumed revocation.—The Delegates reversed that decision, and were of opinion that the factum was fully proved;—they were also of opinion it was not revoked,—for from the notes of counsel it appears that this point was raised and discussed, namely, whether the will was revoked or not;—and I find in some subsequent cases it has been quoted, both in argument and decision, as an authority that the birth of children alone will not revoke.—But suppose the direct point to have been raised, solemnly raised, instead of occurring accidentally in argument,—I think that there were grounds upon which the Delegates could not decide otherwise than for the validity of that will. The will is made twelve days after the marriage;—why, certainly, at that time the testator must be presumed to have contemplated the birth of children;—he must have made his will in contemplation of that event;—he thought it proper at that time to give the whole to his wife;—it is by no means an uncommon thing both for a husband expecting children, and a husband having children, to give every thing to the wife, under the idea that his death will devolve upon her the duty of providing for those children; and that he enables her to discharge that duty, and provide for them by leaving her the bulk of his property. In the case of a will made in that way twelve days after the marriage, when the event

of children must be presumed to be contemplated, it would have been exceedingly dangerous to have held such a will to be void;—besides, it was proved that the will remained in the deceased's own possession, in a trunk with his own letters;—there was no inception of any new will, —so that the revocation must have arisen, if at all, upon the state in which the deceased afterwards lived with his wife;—but the two great circumstances of difference between that case and the present are those already referred to, first, that the property being given to the wife, the duty of providing for the children devolved upon her, and, therefore, they could not be considered as unprovided for; and, secondly, that the will was made at a time when he contemplated the fact of his having children.—That case then, though of very considerable weight, yet does not appear to me to go the whole length of establishing that the birth of subsequent children accompanied by a different combination of circumstances may not, without subsequent marriage, raise a presumption of revocation.

The case of *Parsons v. Lanoe*, in 1748, Ambler's Reports, 557, was this:—Colonel Lanoe, a married man, but without children, made his will on going to Ireland;—he afterwards returned, and children were born;—the question was, whether the will was revoked by his return, or by the subsequent birth of children. The Lord Chancellor decided that, upon the words of the will, it was to be considered as contingent upon his return from Ireland, and consequently was void, and he thought it therefore unnecessary to decide the second point; but the very circumstance of the second point being argued, and the reserve which is maintained upon it by the Lord Chancellor, shows that, at that time at least, there was no such rule understood in the Court of Chancery, as that the concurrence of subsequent marriage was essential to the revocation of a will.

The case of *Altham v. Gray* is, I think, admitted on all hands to have very little bearing on the question, and therefore it is useless to quote it.

The next case is that of *Wells v. Wilson*, decided at the Cockpit in 1756.—It is cited in the case of *Shepherd v. Shepherd*, as reported in a note of the 5th Term Reports, and given in the judgment of Sir George Hay.—I have seen the printed cases;—and several inaccuracies in the case as reported in *Shepherd v. Shepherd* certainly exist.—I have never seen the appendix of the case, so that I am not exactly aware how the evidence stood upon the contrary statements which are made in the printed cases;—but, from them I think the facts may be collected to have been as follows.—Mr. Nicholas Taylor was the deceased;—he died at St. Christopher's in 1751;—he left a widow, and five children, and a very considerable real and personal estate;—the will in question was dated November 5, 1748;—he gave to the wife one-third of certain plantations for life,—and the furniture absolutely;—he gave to his daughter Elizabeth, and his son William, and the child or children of which his wife was then pregnant, 31,000*l.* between them;—the instrument concluded with the words, "*I hereby revoke all former wills by me made, and acknowledge this my last will and testament;*" the will was written on one side of a sheet of paper;—on the other side of which was written another testamentary paper, expressed nearly in the same words, and almost to the same effect, but which was neither dated, nor signed;—the deceased left two children born after the will was made;—one of them I collect to have

been the child of which the wife was then ensient,—the other was wholly unprovided for;—in 1749 the deceased had a fall from his horse, but recovered and lived two years afterwards;—it was alleged on one side, that he frequently declared that he had made no will;—and after his fall he said, “*it was lucky that he had recovered, for his affairs would have been left in great confusion;*”—but on the other side, it was asserted that he had often declared he had made his will, and only thought of altering it:—six months before his death, he had asked Mr. Wilson to be his executor;—it appeared that he was equally fond of those two younger children, as of the others,—and his fortune had considerably increased since the making of his will;—in his last moments a person had been sent for, to make a will for him,—but when he arrived, the deceased had become delirious, and consequently could not make another will:—the will in question was found in the bottom drawer of his bureau;—on one side it was asserted that it was found among loose papers;—on the other, it was asserted that it was folded up among papers of consequence. At St. Kitts the will was pronounced for;—but this sentence was reversed before the Committee of the Privy Council for hearing plantation appeals. It has been contended that doubts must have arisen which of the two papers was first or last written, and also whether the will was meant to act upon real estate. As to which of the two papers was first or last written it could not be material, because the one paper was executed, and the other was not;—the papers were nearly transcripts of each other,—there was no very material difference in the disposition;—taking them either way (though certainly, the probability is that the unexecuted was first written, because the executed one was more formal than the other,—the one was dated, the other without date,—the concluding words of the one are, “*I do hereby revoke all former wills by me made;*” the other was the same, with the addition of, “and I acknowledge this to be my last will and testament,”) but take it either way, suppose that he wrote the unexecuted paper first as a rough draft of his will, and the other afterwards, making some alterations as he proceeded, and then dated and signed it; there can be no doubt whatever but that the executed instrument would supersede the other:—taking it the other way, that he having executed the one paper began this other paper, but did not go on to complete and sign it,—what would be the construction in that case? Why, that he afterwards gave it up, and abandoned it, remaining content and satisfied with the will as it was executed and before signed by him. There can be no doubt, therefore, but that the executed paper was the only valid instrument. The Court might well wish to see the paper itself;—they might well suspend their judgment till it was produced, for there might have been something important arising upon the face of it;—but it is evident from the report of the case that Sir George Hay, who had been counsel in the cause, did not consider the cause to have turned upon any point as to which of the two instruments was the last. Again, it has been said, that the will was intended to operate upon real estate; and therefore not being sufficiently executed for that purpose, that it could not be a valid will, as to the rest of the property;—but it is surely unnecessary to state that this circumstance would not affect its validity as to the personalty. The factum then of the paper having been established, as it must have been in that case, the Court could only hold that it was revoked by circumstances. Now among the circumstances,

subsequent *marriage* did not occur;—the birth of children, accompanied by other circumstances, must have been the ground of holding the instrument revoked. Sir George Hay, in speaking of this case in *Shepherd v. Shepherd*, evidently so considers it. This then is an affirmative case;—and upon the point whether marriage is essential to revoke, one affirmative case holding a will revoked without that ingredient is infinitely more decisive than many cases without that circumstance in which the will is not held to be revoked;—because it might be held not to be revoked on account of the absence of other circumstances tending to prove the intention of the testator to revoke it.

The case of *Shepherd v. Shepherd* goes no further than to show that the naked fact of after-born children does not revoke. That was a case sent out of the Court of Chancery for the opinion of the Prerogative Court.—In the Term Reports (a) it is thus stated, “*Shepherd* the testator having made his will, after some small legacies to his collateral relations, made his wife residuary legatee;—after the will in 1762 his wife was brought to bed of a daughter;—upon the birth of this child the testator added a codicil, whereby he directed that the legacies should be paid, and that an annuity of 300*l.* should be secured on the residuum, and paid to his daughter; the codicil and will were found together,” I presume found together in possession of the deceased.—“In 1765 another daughter was born;—in 1768 a son, who was a posthumous child, the testator having died about six months before his birth;—these two last children being unprovided for, this suit is commenced to set aside the will, and decree an intestacy:—whence it appears that the question is, whether the testator’s will is revoked by the subsequent birth of two children who now remain unprovided for.”—That very able judge decided that under the circumstances of the case the will was not revoked,—that the mere fact of after-born children did not revoke. Certainly, that case, as far as it goes, is binding upon me; and if it be not presumptuous, I should add, that it is a decision in which I am disposed to concur. Upon the question of intention, which in the judgment given by Sir G. Hay, is admitted to be the governing principle, he says, “it has been urged that the intention of the testator would govern, if the intention be consistent with law:—this is certainly true, but that intention must be plain and without doubt; but that is not the case at present, for here is no guide to be found.” Upon the intention to revoke very considerable doubts might well be entertained under the circumstances—the will was not of very old date;—it was in the testator’s own custody;—and upon the birth of the first child, so far from revoking it, he makes a codicil providing for that child out of the residue, and confirms the will:—and upon the birth of other children he might also intend to make a provision for them out of the residue by further codicils, or he might not ever intend to do so; for having given the residue to his wife,—having lived with her a longer time, he might be presumed to have confided to her the duty of providing for those children. Here was no inception of a new will:—still less was there an entire new disposition, inconsistent with and therefore tending to revoke the former. So far, therefore, from the intention being “plain and without doubt,”—which Sir G. Hay states, as being necessary,—the probability of fact is rather an adherence to the will, or at most that he meant to provide by codicil for after-born children.

The utmost length, therefore, that the decision in that case goes, is, that the mere subsequent birth of children, unaccompanied by other circumstances proving intention, does not amount to a presumed revocation.

To the same extent but no further, hardly indeed so far, goes this last case which has been decided, viz. that of Doe on the demise of *White v. Barford*, (a) and another. “The plaintiff claimed under the will of one J. Borteel, who, being seized in fee in 1791, married, and in 1792 made his will and devised the premises in question to his niece, from whom the plaintiff derived her title.—Borteel died leaving his wife ensient, which was unknown to either of them at the time of his death; and afterwards the wife was delivered of a daughter, from whom as heir at law the defendant derived his title; and the question was, whether the alteration of circumstances was a revocation of the will. The learned judge at nisi prius ruled that it was not a revocation; and the Court of King’s Bench was of the same opinion. Lord Ellenborough says, “the argument seems to be that the testator, had he known his situation, ought to have revoked his will; therefore, the law will impliedly revoke it:” then he goes on to say, “where are we to stop?” so that it was the mere naked fact of the after-born child,—no corroboratory fact to show an intention to revoke;—indeed, if actual intention be necessary, in this case of *White v. Barford* it could not have existed, because the wife was not herself aware of being ensient; and therefore, the husband could not, in fact, have intended to revoke; and the will could only be held to be revoked by fiction of law. The Court of King’s Bench did not, I apprehend, mean to lay it down that no possible combination of circumstances, accompanying subsequent birth of children, can amount to an implied revocation, unless marriage be one of the concurrent circumstances.

The very circumstance of trying this case so recently, and even applying to the Court for a new trial, shows, by some degree of inference, that no such rule is considered, even at the present moment, as being settled in Westminster Hall.

The same inference is to be drawn from the Court of Chancery’s having sent the case of *Shepherd v. Shepherd* to this Court:—nay, Sir George Hay, himself, seems to me to have laid down the reverse; and seems to have held that the case of *Wells v. Wilson* was a case establishing that, with special corroborating circumstances, the birth of children might revoke without after marriage;—for he states, “*as marriage alone will not revoke, so the birth of children will not revoke unless upon very special circumstances. It has been done sometimes under a combination of circumstances, but never on the mere ground of the birth of a child: the first case I remember of that kind is the case of Wells v. Wilson, at the Cockpit.*” Laying it down, therefore, that the birth of children, with special circumstances, may revoke; and referring to the case of *Wells v. Wilson*, as a case in which it had been so held;—and speaking of that case, not as a singular case, *but only as the first case.*—It is very possible that the report may be incorrect in that respect; or it may be, that though no other case has been found, one or more may have existed; though, from the decisions of this Court not being reported, it is possible it may have escaped notice. Sir George Hay, in stating the case, specified the combination of circum-

(a) 4 Maule and Selwyn’s Reports, p. 10.

stances under which the revocation was held:—he had been of counsel (as already noticed) in the case, and is now stating the facts judicially, so that it must be inferred that he stated them correctly.—The way in which he states them is this, “*the decision did not turn upon the naked fact of the birth of a child unprovided for, but upon that—and the frequent declarations of the testator,—the state of his mind,—and his repeatedly declared intention in the interval between the fall and his death.*” Now it so happens that all those circumstances do occur here: and even others still more decidedly furnishing evidence of intention to revoke. In this case, as in that, there is a strong anxiety to provide for after-born children shown in the will itself; for in each case the testator provides for the child with which his wife is ensient:—in this case as in that the residue is given to the eldest son; but here it is clear that he did not mean to give to his eldest son more of his personal estate than to the rest of his family:—as far as we can rely on the papers produced in that case, the declarations were loose and general; but here the declarations to his wife are confidential and precise, that “*there is time enough to make a new will, but he will take care of that.*” In that case, though he intended to make a new will, and the person was sent for, but arrived too late, yet there were no instructions given,—nothing begun,—nor was it known what the import of such new will might be:—though he had had a violent fall from his horse two or three years before, endangering his life, yet, even under that sort of incitement, he only talks of, but does not set about, making a new will:—but in the case before the Court, here is not only the inception but the entire outline of a new will:—this new will shows a complete departure from the effect of the former will, as I have already mentioned:—this new will shows that, so far from intending that the immense residue of his personal property should go to his eldest son, he even meant to charge the real estate, before the son was to enjoy it, with legacies to younger children.

The deceased, when talking of intestacy, seems to have had but little objection to it;—he says, “*the law makes the best will for a man.*” He might not mean to die intestate, and yet have no very great objection to it.

Finally,—here is sudden and unexpected death. Now in some of the earlier cases the inception of a will was considered a very important circumstance, as showing an intention to revoke;—at one period, before the law of this Court and its principles were correctly settled, an unfinished paper, coupled with sudden death, would have been established, even though a considerable interval had elapsed between the writing of the paper and the death of the testator. I doubt, whether at the period to which I allude, paper C. might not have been established: but it is now clearly settled that in respect to an unfinished paper, though followed by sudden death, the interval must be accounted for;—and it must be shown that the testator adhered to the intention, but was prevented from finishing it. But still the writing such paper, and sudden death, are extremely strong circumstances, in addition to the birth of subsequent children, to establish the intention to revoke. The present case, therefore, has a combination of circumstances, which appear to me to be stronger than those of *Wells v. Wilson*;—and as strong as can well be imagined,—tending to show that it was the intention of the deceased not to adhere to the old will which he had made under very different circumstances twenty years before.

The Court has been reminded, and not improperly, that it cannot make or alter the law; that it cannot make or revoke wills;—and undoubtedly it cannot;—it is bound conscientiously to administer the law as it finds it: to ascertain its true principles, and to be governed by established rules. It is for this reason that the Court has endeavoured, as far as was in its power, to trace this matter up to its true principles; and to ascertain the rules growing out of those principles; and to be governed by them. The first principle of all wills is the intention of the testator. Positive law, and the decisions of Courts, have prescribed certain rules for ascertaining that intention. They have prescribed that a will of land shall not be good, unless executed in the presence of three witnesses; that a will of personalty shall not be good (with certain exceptions,) unless it be in writing.—So again, the law has established rules for ascertaining the intention of revoking; in some cases it requires certain acts to be done by the testator. It has also, from certain circumstances, implied an intention to revoke. The change of circumstances may imply a change of intention; but the great circumstance which has been regarded as laying the foundation of this implied change of intention is the subsequent acquirement of new moral duties. It is the duty of a father to provide for his children. The law, upon that duty as the principal circumstance, may safely found the intention to discharge it. The Roman law acted upon that circumstance alone, and presumed an intention not to exclude the children. The law of England has not gone so far. It has adopted it as a leading circumstance, but not as alone sufficient to show an intention to revoke:—marriage, however strong it may be as a concurrent circumstance, is not, as far as I have been able to trace the matter, absolutely essential: it was not the doctrine of the civil law; it was not held to be essential by any thing laid down by earlier writers. It is not considered as essential in the earliest cases. And in tracing the doctrine downwards, I have been unable to find it settled, that a revocation cannot take place without the concurrence of subsequent marriage. On the contrary, as far as I can understand the case of *Wells v. Wilson*, there is one case at least, in which a will has been held to be revoked by the birth of children, without the concurrence of subsequent marriage, but accompanied by other circumstances.

The Court has been also warned in respect to the danger of rendering the law vague and uncertain:—undoubtedly it is the duty of every Court to be cautious of opening a door to uncertainty;—but Courts must also be cautious lest, whilst they are attempting to establish rules to guide to certainty, they do not undermine principles, defeat intention, and thereby lead to injustice. Courts have not gone that length. Even where marriage and issue do concur, they have not held such a concurrence to be a positive revocation; but all the circumstances are let in for the purpose of ascertaining whether it was, or was not, really the intention of the testator to revoke. The danger of uncertainty appears to me to be little, if at all, greater in that case than in the present.

Unquestionably where a will has been once regularly made, the presumption of law is strong in its favour; and, as Sir George Hay states, “*the intention to revoke must be plain, and without doubt.*” But under all the facts of this case, taking the subsequent birth of issue as the essential basis of the proof, and accompanied as it is by the other concurrent circumstances, I am of opinion, that the intention of the testator is “plain, and without doubt,” and, therefore, that I am warranted

in law and justice to pronounce against this will, upon the ground that it has been revoked.

Application was made that the Court would direct the expenses of the suit to be paid out of the estate.

Per Curiam. Certainly.

CONSISTORY COURT OF LONDON. 4 H. 523.

POUGET v. TOMKINS, falsely calling herself **POUGET**.—p. 499. 3 *Haub.*

The marriage of a minor annulled, on account of a fraudulent publication of banns. + 5 *also*
262.

REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
ECCLESIASTICAL COURTS,
AT
Doctors' Commons;
AND IN THE
HIGH COURT OF DELEGATES.

By JOSEPH PHILLIMORE, LL.D.

VOL. II.

**CONTAINING CASES FROM HILARY TERM, 1812,
TO EASTER TERM, 1818, INCLUSIVE.**

CASES
ARGUED AND DETERMINED
IN THE
ECCLESIASTICAL COURTS,
AT
Doctors' Commons;
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HIGH COURT OF DELEGATES.

CONSISTORY COURT OF LONDON.

WHINFIELD, by his Attorney, v. WATKINS.—p. 1.

The sequestrator of a benefice is bound to repair the vicarage-house, and build-
 ings; and liable for dilapidations in the Bishop's Court.

CONSISTORY COURT OF LONDON. 96 E.C.C.R. 773.

GREENSTREET, falsely called CUMYNS v. CUMYNS.—p. 10.

A marriage annulled on account of the impotency of the husband.

MARIA GREENSTREET was married to the Rev. Robert Heysham Cumyns, on the 26th of July, 1807:—the present suit was instituted by her in Nov. 1809, to annul that marriage; on the ground of the impotency of her husband. A libel was given in alleging his incapacity to consummate the marriage;—and the husband admitted this fact in his answers. There was in evidence also, the report of two physicians, and two surgeons, who had been duly appointed, and sworn to inspect the person of the husband; which stated in substance, that though the disease, and imperfection of the parts, was not such as to imply impotency to the execution of their functions;—yet that, having heard his own accurate history of his alleged impotence, they put faith in his account; and as he was in good health, they could hold out no hopes of his impotence being remedied by any medical treatment.

Arnold and Jenner for the wife.

Swabey, contra.

JUDGMENT.

Sir WILLIAM SCOTT.

I think there is enough to satisfy the Court that at the time this marriage took place, there was incompetency to perform the duties which the marriage contract enjoins, and which were necessary to render it valid.

The fact is sufficiently established;—and also that there is no collusion between the parties.

There is an air of truth in the evidence; and a great disposition, on the part of the husband, to atone for the injury he has inflicted on this lady; being in utter ignorance himself of his constitutional defects. It appears that he was incapable at the time of marriage, and has continued so ever since;—and I pronounce for the nullity.

Manl. & Selw. 267. MAYHEW v. MAYHEW.—p. 11.

Nullity of marriage being asserted in answer to a libel, charging adultery, the question of nullity is first to be disposed of.

CHARLES MAYHEW instituted proceedings against his wife for adultery:—the libel pleaded that the parties intermarried together on the 4th of Sept. 1806. The wife appeared by her proctor; and admitted in acts of Court, that a marriage did in fact, though illegally, take place between the parties in the cause;—but otherwise contested the suit negatively.

Swabey, for the husband, prayed an assignation on the proctor for the wife, to plead the illegality of the marriage.

Stoddart, contra, contended, that the husband must first prove his libel.

Per Curiam.

I think the preliminary question of the legality or illegality of the marriage must be decided, before the husband is put to the expense of examining witnesses on his libel.

Manl. & Selw. 266.

TREE v. QUIN.—p. 14.

A libel in a suit for nullity of marriage admitted, so far as it pleaded that banns were published under an additional Christian name, which did not belong to the woman; but rejected as to that part, which stated the non-residence of the parties in the parish, where they were married.

PREROGATIVE COURT OF CANTERBURY.

Paige, 505.

ELLIOTT and SUGDEN v. GURR.—p. 16.

A voidable marriage cannot be rendered void, after the death of either of the parties.

JUDGMENT.

Sir JOHN NICHOLL.

Sarah Lester, otherwise Gurr, died intestate in July 1796:—a marriage had been solemnized in 1787, between the deceased then a widow,

and William Gurr then a bachelor, in the regular form. William Gurr survived his wife, but did not take out an administration to her effects. In 1812 a decree was taken out against him, to show cause why administration should not be granted to John Elliott, and Elizabeth Sugden, the brother and sister of the deceased:—the suggestion being, that the marriage was incestuous and void to all intents and purposes, and therefore, that the deceased did not die the wife of William Gurr, but the widow of her former husband, Abraham Lester;—and the question is, whether Sarah Lester is to be considered as dying the wife of William Gurr, or, as dying a widow.

The question appears rather a strange one to be brought before the Court; and it is brought in a strange manner: the decree issued at the suit of John Elliott, and Elizabeth Sugden, in these terms, "*Whereas Sarah Lester, otherwise Gurr, late of Chatham, in the county of Kent, deceased, departed this life in the month of July, 1796, intestate, without having made any will, having at the time of her death goods, chattels, and credits in divers diocesses or jurisdictions, sufficient to form the jurisdiction of our said Prerogative Court of Canterbury; and that in the month of Nov. 1771, the said Sarah Lester, being then a spinster, intermarried with Abraham Lester, who afterwards died in her lifetime, whereby she became his lawful widow and relict,—that some time after, to wit, in June 1787, a marriage, or rather a profanation of a marriage, was had between the said Sarah Lester, and William Gurr, the lawful sister's son of the said Abraham Lester, deceased, whilst living the legal husband of the said Sarah Lester, by reason whereof, the marriage so had between her and the said William Gurr was, and is incestuous, illegal, and null, and void to all intents and purposes in law whatsoever; and, therefore, it was alleged, that the said Sarah Lester, otherwise Gurr, died a widow, without child, or parent, leaving behind her the said John Elliott, and Elizabeth Sugden, her natural and lawful brother and sister, and only surviving next of kin.*"

I wish to know whether there is any precedent for such a decree;—I have asked the counsel, who supported the decree, whether they could show any authority for a next of kin obtaining an administration in exclusion of a husband or a wife so married:—no authority has been cited. If consulted, the Court would not have allowed such a decree to have issued; for, on the face of it, it asserts that which, for reasons which I will presently assign, is not law. I desire in future that no decree of a novel kind may issue without either being consulted in camera, or moved in Court by counsel. It is of consequence, because the instruments of the Court are generally presumed to be declaratory of the law of the Court.

The proceedings on the part of the husband are equally strange. He appears,—and instead of asserting his right to the administration as husband, and praying to be heard on petition,—in form of a protest, or otherwise;—he gives an allegation pleading the fact of marriage. The fact of marriage is admitted in the decree; so that it was unnecessary to plead it:—but it is pleaded simply;—omitting indeed the words free from impediment, but still not so as to raise the question, for that clause is not absolutely necessary.—It is to be presumed all the essentials are pleaded;—no person could infer from that clause being omitted, that there existed a previous impediment by reason of affinity.

The Court will not withhold its opinion, as it is the object of the parties to obtain it,—and I am unwilling to throw upon them any unnecessary expense;—at the same time I must express some surprise that such a question should be made at this time of day; for any one might as well question the most established rules of the Court.

The marriage was within the prohibited degrees; for the husband was the sister's son of the woman's former husband, that is, her nephew by affinity;—but the marriage was not declared void in the lifetime of the parties. Now, the difference between void, and voidable, is so clear, that no person who ever looked into any elementary book on the subject, is ignorant of it. The canonical disabilities, such as consanguinity,—affinity,—and certain corporal infirmities, only make the marriage voidable, and not ipso facto void, until sentence of nullity be obtained:—and such marriages are esteemed valid unto all civil purposes, unless such sentence of nullity is actually declared during the lifetime of the parties.

Civil disabilities, such as a prior marriage,—want of age,—ideocy, and the like, make the contract void ab initio, not merely voidable:—these do not dissolve a contract already made;—but they render the parties incapable of contracting at all:—they do not put asunder those who are joined together, but they previously hinder the junction;—and if any persons under these legal incapacities come together, it is a meretricious, and not a matrimonial union; and, therefore, no sentence of avoidance is necessary.

The present is not a void, but a voidable marriage; and, therefore, not having been declared void in the lifetime of the parties, is valid to all civil purposes; and to all such purposes, the deceased died the wife of William Gurr, and he was her husband, and their issue are legitimate; one of the civil rights of the husband is, that of administration to his wife, which is held to be within the statute of administrations; and is expressly confirmed by statute 29 Car. 2. c. 3, both the administration, and the property belong exclusively to the husband,—it is not an ecclesiastical, but a civil right, though it is a right administered in this Court.

In a matter so clear of doubt it is almost waste of time to quote authorities. Modern cases would hardly be found, because such a point has hardly been questioned in modern times. But it is so laid down by Bracton and Holt; and it is thus stated by Lord Coke, Co. Litt. 33, a. “*If a marriage de facto be voidable by divorce, in respect of consanguinity, affinity, pre-contract, or such like, whereby the marriage would have been dissolved, and the parties freed ex vinculo matrimonii, yet if the husband die before any divorce, then, for that it cannot now be avoided, the wife de facto shall be endowed; for this is legitimum matrimonium quoad dotem; and so in a writ of dower, the bishop ought to certify that they were legitimo matrimonio copulati, according to the words of the writ;—but if they were divorced à vinculo matrimonii in the lifetime of the husband, then she loseth her dower.*”

Here, then, it is clearly laid down, that unless it is avoided in the lifetime, it is *legitimum matrimonium quoad dotem*.

The distinction of a void marriage may be seen in the case of *Hemming v. Price*, 12 Mod. 432. *Hemming* was libelled ex officio, for adultery with a person dead.—She pleaded that they were married,

and had issue; it was replied, that she had a former husband then living:—A prohibition was prayed alleging that the suit would have the effect of bastardizing the issue.

HOLT, C. J.—*The issue are bastardized without any proceedings, if the parents were never married: the Ecclesiastical Court shall not proceed to dissolve a marriage de facto, after the death of either party, as in the case of consanguinity, pre-contract, and the like;—but in this case, if the replication be true, the marriage was, ipso facto, void.*

Per Cur. No prohibition.

In this case, therefore, the marriage was ipso facto void, because there was a former husband living, and therefore it required no sentence.

The case cited, of *Haydon v. Gould*, 1 Salk. 119, was a marriage between Sabbatarians, not celebrated by a priest;—this was held to be no marriage,—a void marriage,—a mere nullity. The Court said, *Haydon demanding a right by the ecclesiastical law, must prove himself a husband according to that law, to entitle himself to the administration.* Harkn.
Nich.
2 Salk.
548.
2 P. 14
505.

In that case, the ecclesiastical law held that they were never married; in the case now before me, the ecclesiastical law, as established in these realms, notwithstanding the canonical disabilities, (and the bishop is bound so to certify) holds that the parties were legitimo matrimonio copulati at the time of the death, the marriage being only voidable, but not having been avoided by sentence of divorce during the lifetime of the parties.

In the present case, then, the parties having been de facto married, and that marriage, though voidable, not having been declared void in the lifetime of the parties;—the husband remained husband to all civil purposes, and is clearly entitled to the administration.

The constant course of practice is in entire conformity with this:—both the husband and the wife uniformly take such administrations—no person can be found to question it, for no case can be produced; and no similar decree is brought forward. If parties will try experiments, and call in question rules clearly established by an uniform course of practice, they, and not the parties proceeded against, ought to be liable to the expenses. It is the duty of the Court to check such novelties in practice, by costs.

Costs given.

BELL v. TIMISWOOD.—p. 22.

The Court never forces a joint administration.

JUDGMENT.

SIR JOHN NICHOLL.

The interest of Robert Timiswood has been admitted as one of the next of kin:—Joseph Bell prays to be joined in the administration with him;—Timiswood objects, and prays that it may be decreed solely to himself.

The Court never forces a joint administration, and for an obvious reason;—because it is necessary for the administrators to join in every act, —there might be a complete contrariety of action, and it would be in the power of one of them to defeat the whole administration.

The question then is, to which of the two must the Court grant it in this instance? Both are in an equal degree of relationship;—no objection is stated to Timiswood;—but against Bell it is said that he has been twice a bankrupt, and that the last time there were no dividends.

Surely, if the Court has an option (as it undoubtedly has) between these two parties, I shall not think Mr. Bell, who has taken such bad care of his own affairs, the preferable person to be entrusted with the management of the affairs of others. One party is unobjectionable;—the other is highly objectionable.

I shall grant the administration to Timiswood—and condemn the other party in costs.

RICKARDS v. MUMFORD and FREEMAN.—p. 23.

By cancelling a will in his own possession, a testator cancels a duplicate in the custody of another person.

GEORGE RICKARDS died on the 25th of November, 1810. On the 11th of July of the same year, he executed a will in duplicate, one part of which he retained in his own possession;—the other he sent by his attorney to Mrs. Freeman. The former instrument was not found at his death;—the duplicate sent to Mrs. Freeman was propounded by her, and Mr. Mumford, the other executor named in it; and opposed by Mrs. Rickards, the widow of the deceased.

Adams and Jenner for the executors.

Swabey and Burnaby contra.

JUDGMENT.

Sir JOHN NICHOLL.

There is no question as to the due execution of this will; but the true question in the cause is, whether this will was revoked by the deceased.

Before I proceed to the facts of the case, it may be convenient to state the one or two positions of law, or rather of legal presumption.

Where a testator has a will in his own custody, and that will cannot be found after his death, the presumption is, that he has destroyed it himself,—it cannot be presumed that the destruction has taken place by any other person without his knowledge or authority, for that would be presuming a crime. Again,—if a testator executes a duplicate, and keeps one part himself, and deposits the other part with some other person, and the testator voluntarily cancels, or destroys the part in his own custody, it is a revocation of both. So also,—the act of cancellation, or destruction, is *prima facie* done *animo cancellandi*, and a presumptive intention to revoke, till the contrary is shown. The reason is, that the act of voluntarily destroying the instrument implies the intention of revoking its whole effect.

These positions have frequently been laid down in this Court as legal presumptions; but, like all other legal presumptions, they may be repelled by evidence. The *prima facie* presumption, then, is, that the deceased himself destroyed the will in his own custody, with the intention of revoking it altogether. But, to proceed to the facts of the case:—The will was executed in July, 1810;—on the 29th of October, 1810, he married;—previous to his marriage, but after making his will, he had executed a settlement of certain estates on his wife;—freehold property at Hatton; leasehold at Kennington. The Hatton estate is specifically devised by the will to raise 600*l.* which is bequeathed in legacies to his cousin Freeman for life, and then to Mumford's children:—Mr. Mumford himself is also a considerable legatee;—the whole fortune is divided by various legacies among his family, and friends.

Such a will, therefore, could hardly, by possibility, have been intended, under such a change of circumstances, to have remained unaltered and unrevoked. His marriage, though not a revocation of it, yet is a circumstance to account for the destruction of the instrument by the deceased, as it would probably induce some alteration in the disposition of his fortune; for, notwithstanding the settlement, Woodward admits that the deceased talked of perhaps doing something more for his wife; and, as the settlement is only in bar of dower, the presumption is, that he intended her to be benefitted out of his personal property, and the will became inofficious.

But, supposing the settlement had done every thing he intended to do for his wife; still, the taking these estates out of the operation of his will, would almost necessarily have induced a new arrangement and disposition of his fortune among his family and friends: and, in conformity with this, the evidence on both sides concurs to prove that it was the intention of the deceased to alter the disposition of his property, and to make a new will;—what that disposition would have been, the Court has no means of knowing, but there is enough to show that it certainly would have been of a different tenor from the will in question.

Now, having arrived at this fact, we have a strong ground of probability, not to repel, but to support, the legal presumption, that the deceased himself destroyed the instrument in his own possession *animo revocandi*, it no longer containing that disposition which he wished to take effect.

Witnesses have been examined on both sides, to declarations made by the deceased; and also to declarations made by the widow after his death. The deceased made several wills, which he destroyed; and he seems always to have employed different attornies. Woodward, an attorney at Pershore, made a will for him, three or four years ago:—Sandilands, an attorney at Tewkesbury, made a will for him in June 1810:—Hervey, an attorney at Ross, made the will in question:—White, an attorney at Tewkesbury, drew his marriage settlement, in October, 1810:—and Mr. Hyde, an attorney at Worcester, was applied to to make his new will.

Tidmarsh, an intimate friend of the deceased, and a perfectly disinterested witness, says, “that when he was talking to the deceased about going for his marriage licence, he said he would fetch down his wills, and burn them; and accordingly he went up stairs and fetched

them, and said he would burn them: but the deponent advised him not, saying, he might not marry;—he might die;—and he did not know what might happen; and the deceased replied, that is a good thought; I will not burn them till afterwards.”

Here, then, the deceased's intention is to destroy his will; his mode of revocation was, not by cancelling the instrument, but by burning it; and he only defers doing it till after his marriage, lest any accident should prevent the marriage.

On the 1st of November, three days after the marriage, Mr. Woodward has a conversation with the deceased;—he tells him of his marriage;—he fetches down his wills;—he burns that prepared by Sandilands in June;—he has this will of July read over to him;—he says, “it will be a loss to Mumford, if I don't alter it;—perhaps, in a few days, I may send to you to do it;—till then, I shall take care of this; and he carried it up stairs again.” He says, “that on the 21st of November, the deceased again told him, I have not altered my will; it remains as it was; but I think I shall send, or come to you in a few days:—but, he added, in a jocular way, ‘you lawyers charge so high; it is dangerous to have any thing to do with you.’”

It has been inferred from this conversation that the deceased had not at this time destroyed his will; but if this was so, it does not follow that he might not subsequently destroy it:—it is clear, however, that he was not sincere in his expression; for he had that day been making arrangements to go over to Worcester, to get Mr. Hyde to make a will for him.

The declarations on the other side are more direct, and such as, when connected with conduct, leave no doubt, or hesitation on my mind. Mr. Baker, an intimate friend of the deceased, says, that he applied to him on the 14th of November, to prepare a new will for him; he said he had one at home which would serve as a guide:—he appointed to be with him on the Sunday following:—on Sunday he advised the deceased, as his property was considerable, to employ a professional man; the deceased thanked him, and said he would go in the course of a week to Worcester, to a Mr. Hyde to do it; and he well remembers that he then said, “I will immediately destroy the will I have by me, and go to Worcester and make another.”

The only will he had then by him was the will in question;—for he had destroyed the will prepared by Sandilands on the first of November, when Woodward was with him.

The evidence does not rest here; for Mr. Tidmarsh says, that “on the Wednesday following, i. e. (on the 21st of November,) the deceased told him that Baker had recommended him to go to an attorney, and that he meant to apply to one at Worcester;—he promised to accompany the deceased there on the Thursday in the following week, or sooner, if he wished it;” and that the deceased, in the same conversation, said, “Charles, I have burnt them wills you saw me with the other day, and the sooner we go to Worcester the better;”—and he pressed the deponent very much to go to Worcester with him on the Friday following.

This is an express declaration that he had burnt the wills; and it is made the basis of his conduct:—it is the reason assigned for hastening the going to Worcester.

Coupling this evidence together, the declaration to Baker on the 18th, “that he would burn it immediately;”—and the declaration to Tidmarsh

on the 21st, "that he had burnt it; and, therefore, that the sooner he went to Worcester the better:" we have the strongest confirmation of that, which is the legal presumption, namely, that the deceased himself dissolved the instrument in his own custody, and that he did it *animo cancellandi*.

With respect to the declarations imputed to the wife, and her having said that the will was not destroyed, and also her silence, from whence it is inferred that she knew nothing of the destruction of the will by her husband; they are of little weight in themselves, and the evidence respecting them is at best contradictory. In her answers she states her full persuasion that her husband had destroyed it;—there is nothing to impeach her character;—it is impossible to infer otherwise, from the expressions attributed to her by the witnesses. Both Baker, and Harris say, that Mrs. Rickards declared to them that the deceased had, a few days before his death, produced his will to her, and asked her if she wished to see it before he destroyed it;—and that she supposed he had burnt it.

Neither her silence; therefore, under the circumstances in which she was placed, nor any thing she has said, raises any just suspicion that she was guilty of having destroyed the will.

The conclusion of the Court on the whole of the evidence is, that the deceased himself destroyed the will in his possession;—that he did this intentionally,—and that he not only thereby cancelled the paper itself, but the duplicate which was not in his possession.

I pronounce against the will, and decree administration to the widow.

CARSTAIRS the Attorney of GRIFFITHS, v. POTTLE.—p. 30.

Unfinished paper not established as codicillary.

WILLIAM WHEELER sailed from Madras for England on the 16th of March, 1811:—he died on the voyage on the 19th of May, of an abscess, which had formed on his side three weeks before his death;—a week before his death he was sensible that he could not live. On the day before he left Madras, he made a will of the following tenor:—

"In the name of God Amen, I William Wheeler, of Portsmouth, in the county of Southampton, and now of Madras, being about embarking on board the H. C. S. Anne, for Europe; and being in sound mind and memory, make this my last will and testament. 1st, I resign to the Almighty my soul, to be disposed of as it may please him, trusting it will be received into the kingdom, there to enjoy everlasting happiness, and my body to the earth from whence it came. 2d, I give and bequeath unto each of my uncel Lewises children, who now live at Waterford, near Portsmouth, the sum of one hundred pounds sterling. 3d, I give and bequeath unto my cousin Nothem Bennetts son, Henry Bennett, the sum of five hundred pounds sterling. 4th, I give and bequeath unto my uncel Exeus children, and my uncel Morgans children, to be equally divided among them, all the remainder of my property, of whatever kind it may be: and I hereby wish R. Griffiths to be my attorney, to see that my poor relations receive all that is due to them from this will:

in fact, I appoint the Mr. Griffiths to act in all matters that concern me. This is my last will and testament, written by myself, the 15th fifteenth day of Marh, in the year of our Lord 1811, one thousand eight hundred and eleven. Amen.

. W. WHEELER.

Madras, 15th Marsh, 1811.

Witness,

J. Baggett,

S. James."

This will was proved in the supreme Court of judicature at Madras.

The three following papers, of a testamentary nature, were found in the writing desk of the deceased, on board the vessel, after his death, viz.

(A.)	
Each of my uncel Lewis } children	£ 100
Nathers son	500
Morgan and Exell to get the re- mainder	

(B.) (a)	
To Mrs. George or her daughters	500
To Mrs. Morgan	500
To Mrs. H. the aboves sister	5
Mr. W. Sabbin	300
To Mr. Joseph Read	100
To Miss Morratt, Madras	100

6,000
4,000
1,000
1,000
600
£ 12,600

(C.)

"In the name of God, Amen, I William Wheeler, of Portsmouth, in the county of Southampton, and now residing in Madras, and at present am a partner in the firm of Griffith, Wheeler, Griffith, and Cook, and being in sound mind and memory, do make this my last will and testament.

"1. I resign to the Almighty my sole to be disposed of as it may please him, trusting it will be received into the kingdom of heaven, there to enjoy everlasting happiness; and body to the earth from whence it came.

"2. I give and bequeath unto my cousin Morgan, who is married to Mr. Pottle, and I believe are now living at Fareham, about ten miles from Portsmouth, the sum of 6,000£, to be equally divided among her brothers and sisters and herself.

"3. I give and bequeath to my cousin Isabella Breaden, eldest daughter of my uncel Exell, and her brothers and sisters, to be divided equally between them, the sum of 4,000£.

(a) In paper (B.) there were several other names, with sums opposite to them, but both the names and sums struck out with a pen.

“4. I give and bequeath unto master Henry Bennett, who is a son of my late cousin Nathen Bennett, and who will be found on enquiry at Mr. Morris, Piercy-street, Portsmouth, the sum of 1000/.

“5. I give and bequeath to my cousin Leah and Charlotte Lewes, eldest daughters of my uncel Lewes, who lives at Waterford, the sum of 600/. or provid'd either of them are dead, her share to be divided among her sisters.”

The three testamentary papers, marked A., B., and C., were found in the writing-desk of the deceased on board the vessel, after his death.

Mrs. Pottle propounded paper C. as codicillary to the will of the 15th of March, 1811.

The allegation in which it was propounded pleaded, “that about a week after the deceased was confined to his cabin, an abscess broke in his side, and from that time he was sensible of his approaching death, and declared he thought it impossible for him to recover;—that, whilst on shipboard he was reserved upon the subject of himself and his affairs, and that he was attended only by a man-servant: that he used, prior to his being confined to his cabin, to employ himself much in writing at his writing-desk, corresponding at times with friends of his, who were passengers on board other vessels of the fleet, and he was frequently observed to destroy the papers he had written. That after becoming confined to his cabin, he again wrote at different times, and was particularly remarked to be employed in writing the aforesaid papers, A., B., and C., or some papers very nearly resembling the same in size and appearance; and from the time of his being so confined to his cabin, he was not observed to destroy any papers. That on the second, or the third day, immediately preceding his death, being then wholly confined to his cot, he requested his servant to bring him his writing-desk, as he wished to write, and it was accordingly placed upon a pillow across his knees, and he was raised up, and supported by pillows at his back, after which he was left alone for about an hour; when his servant returning to the cabin, found that he had folded up together several papers, upon some or one of which he had been writing; and he, the said deceased, then apparently much exhausted, desired his servant to lock up the same in the writing-desk, the key of which the deceased kept fastened to his watch-chain, and the same was accordingly done, and from that time till his death the said deceased grew gradually weaker and weaker, and never again attempted to write, nor was he, from weakness, at any time able so to have done. And in the evening of the following day the aforesaid writing-desk fell down from the stand on which it had been placed, and the hinge was broken, and there fell out some pagodas in specie, and the aforesaid papers; which the deceased having observed, earnestly desired them to be replaced carefully, telling his servant not to mind the money, as that was of no consequence in comparison with the papers; and the papers, which were found to consist of two small papers, folded, or wrapped up in a large one, having been, together with the specie, replaced, the desk was not again opened till after the death of the said deceased.”

Swabey and *Burnaby* opposed the admission of the allegation.

Phillimore and *Herbert* supported it.

JUDGMENT.

SIR JOHN NICHOLL.

I agree with the counsel for Mrs. Pottle, that if this paper should not be inconsistent with the will, it might be proved in conjunction with it. The rule is, that where there is a regular will,—and another paper begun as a new will which the testator has been prevented by the act of God from completing,—the two papers may be taken together as the will of the deceased, and operation *pro tanto* be given to the latter paper, provided the proof of final intention be clear: but it will not wholly revoke the former paper.

The present case, however, does not fall within this rule of law.

The deceased embarked from Madras for England, on the 16th of May, and on the day before executed a will; leaving legacies to different relations, and two bequests to his uncle's children:—that will has been proved in India;—shortly afterwards, as he was proceeding in his voyage, he is stated to have entertained an intention to make some alterations in the distribution of his property among his own family.

Three papers are before the court.

A. is a short abstract of the executed will.

B. is a calculation of his property without date.

C. is the paper propounded. There are no executors named in it;—it contains no disposition of the residue;—it has no date,—no conclusion;—it is clearly unfinished;—upon the face of it there is no constat when it was written;—it might have been before the executed will;—it might, and it really appears to me that it was, written before;—it begins in regular form, and describes him “*as now resident at Madras.*” Compare this with the inception of the will written before he left Madras;—in that he states himself to be “about to embark.” Paper *C.* could not be copied from the executed will, for he had it not with him.

It has been urged that, from the extension of the legacy to his cousin Bennett's son, it must have been written subsequently to the executed will;—it might have been the reverse, he might have ascertained his property to be smaller than he expected. In the allegation nothing direct is pleaded as to the date.

As it is unfinished, and the object of it is to control a will regularly executed a short time before, I must be satisfied that he was prevented by the act of God, from the due execution of it:—independently of this, there is nothing to show that he had made up his mind to this alteration as far as it goes;—the deceased for three weeks was sensible of the dangerous state of his health:—this paper was broken off in the middle, and there is not a single declaration that he ever meant to conclude it;—he expresses no wish on the subject,—there is no reference by him to any testamentary act.

Upon the whole, the Court would not be safe in pronouncing for this paper:—if all the facts alleged should be proved, they would be insufficient to establish an instrument in this very incomplete and uncertain state, so as to control a will regularly executed a short time previously.

I shall reject this allegation; at the same time it is very proper that it should have been submitted to the consideration of the Court, and I recommend the executors to pay the costs of the proceeding.

BUTLER v. BUTLER.—p. 37.

Objections to an inventory overruled.

JUDGMENT.

Sir JOHN NICHOLL.

Edward Butler is the party deceased:—administration of his effects was granted to his widow:—an inventory was called for by four of his next of kin, two brothers and two sisters,—which was exhibited in November, 1811: and the party prayed to be dismissed. She was assigned to be so, if not objected to, on the Bye Day;—no objection was taken; and, on the Caveat day, she was actually dismissed.

On the first session of Hilary Term, the Proctor for the brothers and sisters alleged that he had been mistaken on the caveat day; and prayed still to be allowed to object;—this indulgence was granted;—an allegation was asserted, and then waived;—an act on petition was gone into;—if he did not make good his objections, there was some peril of costs, for he has kept the other party three terms before the Court, and put him to considerable expense.

The objection to the inventory is in three items, which are said to have been omitted;—this is a serious charge; fraud and perjury are almost necessarily imputed by it to the widow;—fraud by concealment and omission:—perjury, in swearing that all the articles of the deceased's property were set forth in the inventory;—this charge has been answered by affidavit, and is now abandoned; it is admitted that the deceased had no such property; and that there is no omission in the inventory. If the parties had inquired, they might have satisfied themselves that there was no ground of suspicion whatever;—none for charging the widow with omission;—the utmost length the Court would have gone, would have been to hold that, from the declarations of the deceased, there was reasonable ground for inquiry:—a little diligent inquiry and candid examination would have cleared up this point.

When this point was satisfactorily answered, (and it was the only question at issue) a new objection was taken; not to the inventory, but to the administration. It is said, that the administration is taken out under the proper sum; and that the securities ought to be called upon to justify. The amount of the property is stated in the inventory at 3550*l.*, and the administration has been taken out under 3500*l.* The widow answers that the whole amount of the property, in value, is 3550*l.*; but that some of the debts due to the deceased have not been received, and probably never will be recovered; and if they should, she shall then take a new administration. The Revenue requires the administration to be taken to the extent of the sum received,—that is sufficiently hard,—but the administrator is bound to take out the grant to the extent of the sum he expects to receive;—this is as much as the widow can in this case expect to receive.

This appears to me a mere frivolous objection; why was it not taken as soon as the inventory was exhibited? The turning round in this way, so far from protecting the party from costs, is a strong additional ground for them;—and it is lenient in the Court not to condemn in the whole costs;—but I shall condemn in those costs which have arisen subsequent to the second session of last Easter Term.

With respect to the securities justifying, it is no part of the present petition;—the petition relates only to the inventory, and the omission in the inventory.

ARCHES COURT OF CANTERBURY.

COOKE v. COOKE.—p. 40.

(An Appeal from the Commissary Court of the Dean and Chapter of St. Paul's.)

A moiety of the husband's property given to the wife for permanent alimony—
but given from the date of the sentence, and not from the return of the citation.

JUDGMENT.

SIR JOHN NICHOLL.

03.244
a. 195. This was originally a suit by reason of adultery, brought by Hannah Fox Cooke, against Richard Cooke, her husband:—the wife succeeded in that suit;—the judge pronounced the libel proved, (Michaelmas Term, Nov. 9, 1811,)—and decreed a separation:—that sentence has been acquiesced in;—the delinquency, therefore, of the husband has been established, and is admitted. The Court below then proceeded to allot a permanent alimony to the wife;—no alimony during the suit had been applied for;—but, as the wife had a separate income, it was understood that an application for any further allowance, during the suit, as alimony, would be resisted; and she remained content with her separate allowance. I consider this as tantamount to alimony during suit.

The question afterwards (March 6, 1812,) came on as to the allotment of permanent alimony;—and the husband has appealed to this Court, complaining that too large a sum has been allotted to the wife: and the question which the Court has now to decide, is, whether the sum allotted be too large or not.

Now, although alimony, that is, the allowance to be made to a wife for her maintenance, either during a matrimonial suit, or when she has proved herself entitled to a separate maintenance,—is said to be discretionary with the Court; but it is a judicial, not an arbitrary discretion, which is to be exercised; and therefore, it is clearly a subject of appeal: at the same time, upon a point where there is no other rule or criterion to guide than the *boni viri arbitrium*, it is only upon a strong difference of opinion where the Court of appeal would be disposed to disturb the sentence.

The first point to be ascertained, is the meaning and extent of the sentence;—the words are “*The Judge allotted the sum of 450*l.* per annum, in addition to the income which she (the wife) now receives in her own right, to be paid her as permanent alimony, to be computed from the return of the citation, and to be paid quarterly.*”

It does not appear upon the face of the sentence, what it is that the wife receives “*in her own right;*”—there is no statement of the sum,

nor is there any reference in the sentence itself to any income, or to any part of the proceedings in which that income is mentioned.

In the first article of the allegation of faculties, certain property is referred to of that description, and it amounts to about 89*l.* a year, besides a house worth about 80*l.* annually:—the answers to this article admit these statements; but in the answers to the eighth article it is stated, that besides this property, which was settled on the wife before marriage, there was a further settlement in 1815, subsequent to the marriage, of 162*l.* annually. An affidavit has been also made by the wife, in which she states the joint amount.

It is not quite clear whether the 450*l.* was in addition to both of these settlements, or only to one. I have enquired whether any thing passed in the Court below, or was understood there by the parties, which would afford a construction of the sentence in this respect; and no answer has been given: It must, therefore, seek the construction from the expressions;—the words are "*in addition to the income which she now receives in her own right;*"—these words are only applied to the property mentioned in the first article, and in her answers to that article:—there it is expressly so described; but no such expression is cited either in the answers to the eighth article, or in her affidavit, as applied to the second settlement, viz. the one made after marriage. The 450*l.* therefore must be construed as additional to the sum secured by settlement before marriage, and not to include the subsequent settlement.

This property consists of three tenements, which together are let for 99*l.* per annum, and a house in which the parties resided, worth now about 80*l.* per annum:—the husband has retained possession of this house during the suit: but he has now declared in acts of Court, that he is ready to deliver it up with the improvements, to his wife; taking then the house, in its improved state, at 80*l.*, the other tenements at 99*l.*, and the 450*l.*, (the whole alimony allotted) taken together, would amount to nearly 630*l.*, subject however to the property tax.

The question is, whether this be too large a proportion out of the joint fund?

It is unnecessary to ascertain to a few pounds, the exact amount of the property; but it is to be observed that in the particulars of the property in possession of the husband, amounting to 800*l.* per annum, he has deducted the property-tax and all other outgoings, and besides this he has the advantage of having the amount taken upon the representation given by himself, in his own answers; so that the sum allotted to the wife is rather less than a moiety of the joint stock; of this not less than 800*l.* per annum has been derived from the wife.

It has been truly stated that there is a material distinction between permanent alimony, and alimony during suit; it is unnecessary to enter into the reasons for this; they are obvious:—it is sufficient that such is the rule of the Court.

In *Biggs v. Biggs*, Consist. of London, May 28, 1791, the alimony during suit was 40*l.*; the permanent alimony was 75*l.* 10 *Par.* 12
26.39.

In *The Countess of Pomfret v. The Earl of Pomfret*, though there was a large fortune, and the husband had to maintain the rank and dignity of the peerage, one third was given, i. e. 4000*l.* out of 12,000*l.* Certainly, the wife had brought a large fortune, but then she was elevated in rank by the marriage.

In *Taylor v. Taylor*, Arches, May 14, 1796, the income was about 204.24 204.24

300*l.* and a moiety was given; it was certainly proved in that case, that a large proportion of the fortune came from the wife; but it furnishes a precedent for a moiety: it is said that in that case the income was smaller, and that the Court always gives a larger proportion where the income is small; there may be good reasons for giving less where the question is on alimony during suit; when the wife is to live in seclusion, and wants a mere subsistence;—but on a question of permanent alimony, where the delinquency of the husband is established, and especially where a large proportion of the fortune comes from the wife, the same considerations do not apply:—nay, they may be inverted;—it is the delinquent, then, who should have the mere subsistence, and who ought to live in retirement;—the larger the fortune is, the less reason there is why the wife should be deprived of any of her property to support a vicious and profligate husband:—but, without going the length of this reasoning, the case of *Taylor* affords a precedent for a moiety. In some cases, even of small property, certainly a less proportion has been given; but in those cases the husband has acquired his subsistence by his own personal exertions.

In *Biggs v. Biggs*, 75*l.* was given; the husband was a seller of venison, and his income stated to be 300*l.*

In *Dawson v. Dawson*, Consist. of London, July 23, 1802, 80*l.* was given; the husband was a working jeweller, and his income stated to be 300*l.*

In the present case, the bulk of the fortune comes from the wife; and the husband, so far from increasing the property by his own exertion, has neglected and given up his business, and is living in a state of open adultery.

I quite concur in all that has been said, as to its being a part of the duty of every Court of Justice to guard the public morals of society,—this principle has been fully established, and forcibly applied to cases where the husband is the injured party:—on this principle pecuniary damages are awarded in other Courts;—and where the husband is the delinquent, and the wife the injured party, the same principle may be justly applied, not vindictively, nor excessively, but reasonably and moderately.

In this instance the husband raised himself to independence and affluence by marrying this young woman; he has not only injured, but insulted her by debauching a maid-servant, who lived at the adjoining house;—for this servant he has taken a house, and for her society he has abandoned the society of his wife;—he has children by her, and receives his friends in the house, and introduces her to them as his wife.

It is a most offensive case;—if he violates the marriage contract, it might be equitable perhaps, that he should lose the whole benefit of it, and be obliged to give up the whole of the wife's property; at all events, it would be most unjust that the wife should be deprived of any considerable portion of the property she brought, in order to support the husband in public scandal, and to enable him to continue his adulterous connexion, and provide for the issue which are the fruits of it.

Construing the sentence therefore, as I have done, I do not think that the learned Judge went too far in the additional sum which he allotted. I am, therefore, in no degree disposed to disturb that part of the sentence, except so far as to add some words to it in order to render the meaning more clear and certain.

In respect to the time from which the alimony is payable, namely, from the return of the citation, this, I apprehend, is contrary to the rule of the Court, and to the reason of the thing. No alimony was expressly allotted during the suit; but, on the one hand, as what she was willing to receive as a sort of separate allowance, while she was living under his roof, without the payment of either rent or taxes, (in the hope, probably, of reclaiming her husband) is no criterion for permanent alimony; so, on the other hand, I can see no ground to depart from the ordinary rule of these Courts, by carrying back the permanent alimony beyond the date of the sentence.

It is clear from several cases that the true rule of the Court is to decree permanent alimony from the date of the sentence.

In *Taylor v. Taylor* no time was specified; the sentence and the decree for alimony passed on the same day; and, therefore, the alimony must have been from the date of it.

In *Biggs v. Biggs* the rule is more manifest;—the alimony during the suit was 40*l.*;—it was increased to 75*l.* from the date of the sentence.

This case is directly in point, and under the authority of it I feel bound to reverse this part of the sentence.

Accordingly the Court pronounced for the appeal and complaint made ^{10th Jan} and interposed in this behalf, and retained the principal cause, and there-^{26.} in affirmed so much of the decree appealed from as allotted the sum of 450*l. per annum*, as alimony, to Hannah Fox Cooke, the respondent, in addition to the income described to be received by her in her own right, so far as such income arises from the property mentioned in the first article of the allegation of faculties admitted in this cause, including the leasehold house situate in the terrace, Kentish Town, with its improvements, and in its present condition, agreed to be delivered up to her by a declaration made by Richard Cooke, the appellant, in acts of Court, on the third session of this term, but directed that any sum received by the said Hannah Fox Cooke, since the sentence given in the Court below, or which may hereafter be received by her under a certain settlement alleged to have been made subsequent to her marriage with the said Richard Cooke, and to amount to 162*l. per annum*, shall be considered as a part of the 450*l.* so allotted, and not as part of the income received by the said Hannah Fox Cooke in her own right, and moreover reversed so much of the said decree appealed from as directed the said sum of 450*l. per annum* to be computed from the return of the citation issued in the Court below, and directed the same to be computed from the day of the sentence in the said Court; and further directed the costs to be paid by the appellant, and directed a monition to issue against Mr. Cooke for the payment of the alimony due.

HARLEY v. BAGSHAW.—p. 48.

Three papers established as containing together a will.

JUDGMENT.

SIR JOHN NICHOLL.

Several papers are propounded, as the will of Mrs. Anne Newton;—they are propounded by Miss Harley, a legatee, and opposed by Mr. Bagshaw, the brother of the deceased.

Besides the papers propounded, there are two testamentary instruments of a much earlier date.—The deceased was a widow, possessed of very considerable property, who resided in Harley-street: all the papers are in her own handwriting.

No. 1. is the inception of a will, in which no great progress had been made, the deceased having only written down the side.

No. 2. is a long will consisting of two sheets of paper, fully written, signed by the deceased in several parts; the last date is Jan. 16, 1808;—the first date is June 1, 1804: there is another of Nov. 1804; and others of the 5th of Feb. and 6th of Jan. 1806. It appears to have been the habit of the deceased to write her will at different times;—adding to it from time to time, and whenever she ceased writing to subscribe the date; and this she did, even though she wrote at different times in the same day. The presumption is, that it was so dated, and so signed, to give it effect as far as she had proceeded;—and possibly she had been told that any paper in her own handwriting, and signed, would be a valid disposition of her personal property.

No. 3 is a new will also, in two sheets of paper, fairly written, but in the same manner as in No. 2.;—the first date is 12th March, 1806; at the end of the third page this is signed;—there are likewise other entries in 1806, which are also signed. In the second page of the third sheet there is a recital that two of the executors are dead, and that the third is in South America; and there is the appointment of Miss Harley, daughter of the bishop of Hereford, as sole executrix; this is dated May 1811, and signed:—after this she proceeds to make additional bequests;—she stops, dates, and signs at several different places;—the final signature is in 1811.

No. 4 is a very short instrument, commencing in 1806; it is revocatory of a particular legacy;—it is finally dated in 1811;—it clearly refers to No. 3, and was altered at the same time.

No. 5 begins a new will, and was manifestly so intended when originally commenced;—after introductory words, it appoints Miss Harley sole executrix, and is dated 5th June, 1811; it afterwards goes on to give legacies to the same persons as in No. 3; there are two or three stops, and signatures, but they are all of the same date, viz. 5th June, 1811.

Looking at all these papers together, it is highly probable that the deceased in No. 5, had not gone so far as she intended; she had many other objects of bounty, and there is no disposition of the residue: comparing it with former papers, and with the habits of the deceased, it looks as if she had broken off in the middle of what she intended to be a new will; but which was not to revoke and supersede others, unless finished.

It has been contended, that the instrument being dated, and signed at the end, the Court cannot go into the consideration of parol evidence as to intention; if it was a new will completed, parol evidence could not be gone into as to the construction; but in this case *quo animo* it was written; whether it was signed in order to finish it, or whether it was incomplete and imperfect, is a preliminary question, which this Court is bound to entertain;—it must enquire into the fact of the intention with which it was written; that intention may be collected from other papers and parol evidence.

In the case of *Matthews v. Warner*, 4 Ves. jun. 186, it was held, that

in the Court of Probate all circumstances were to be taken together to ascertain whether it was a temporary, or permanent act; the paper in that case was signed, but it was uncertain whether it was perfect or incomplete.

This paper was written by the deceased herself, a female unacquainted with business; if it is satisfactorily shown that it was intended at first as an entire new will, yet afterwards as codicillary, there is no rule of law to exclude evidence of intention; it is the very province of the Court of Probate to enquire into it.

Suppose she had signed this paper in the presence of witnesses, declaring that she was unable to go on, and that she signed it as giving effect to alterations pro tanto, and to be taken as a codicil; surely, on inquiring in this Court, as to the factum, we must receive evidence of that intention.

This paper, (No. 5,) contains no revocatory clause;—no disposition of the residue;—if it is a complete and finished paper, it does not require a clause of revocation;—but if it is unfinished, it will not totally revoke. In such a case, though originally intended as a new will, yet if it is not finished it can only operate in conjunction with the other paper; it supersedes the other pro tanto;—and both must be considered as containing together the will.

In *Goldwyn and Aspenwall v. Coppell*, there was a will regularly executed in Jamaica. The deceased gave instructions for an entire new will;—before he had disposed of the residue he became incapable;—the Court pronounced for the two papers, as containing together the will.

This has been the constant doctrine of the Court; where instructions are finished they are not revoked by an unfinished paper, except as far as it goes;—the law presumes that the testator would have adhered to the remainder.

In this case the Court is not left to presumption; the proof of intention is satisfactory, if the evidence is admissible, and if the witnesses are to be believed:—the witnesses, it is true, are releasing witnesses, but they are competent witnesses;—the Court must hear them with caution; but their evidence is so confirmed that, unless they have corruptly deposed, no doubt exists of the deceased's intention.

The deceased being in very ill health, removed in May from Harley-street, to lodgings in the Edgeware road:—on the 5th of June she told her maid “that she was going to copy her will, which she had altered in Harley-street in May.” Mr. Griffiths, the apothecary, confirms this;—he states, “that he found the deceased, one day in June, with papers before her, which she put into a box, saying, the will was in the box, and she was writing it over again.”—This box, with the papers in it, was delivered to Miss Harley in her lifetime;—the deceased, then, did not intend to revoke the former will, but to copy it; and though she might, in so doing, make alterations in form and substance, yet the effect will not be to revoke, but merely to alter as far as it has gone.

The deceased became worse, and did not go on to write after the 5th of June; but she repeatedly and anxiously declared to her maid, and the woman who attended her, that the will she had altered in Harley-street was to stand good, if she did not complete the other, and that the other was to be codicillary.

There is a particular conversation deposed to, as having taken place

on the 14th of June:—the deceased having become very weak, declares to three persons earnestly desiring them to entreat her brother to carry her intentions into effect, “*I mean, she said, my will I altered in Harley-street, in May last, and my last, I mean my two last wills to stand good;*” two witnesses depose to this. Mr. Bagshaw, in his answers, admits the same in effect,—that the deceased requested he would not oppose her will; his admission strongly confirms the representation of the witnesses, that there was a solemn declaration, a sort of formal publication of these papers, as containing together her will.

On the 18th of June, also, the day before her death, she recognized the paper No. 3, by referring to a legacy left in it to Sir Walter Farquhar.

Edwardes, the deceased’s maid, says, that “she verily believes the deceased intended the papers 3, and 5, down to the time of her death, should operate as her will;” and Worthing says, that the deceased often expressed in the strongest terms that the will she altered in Harley-street, and her last, were to stand good, and not to be disputed.”

This evidence taken, with her declaration to the apothecary, “that her will was in the box, and that she was writing it over again;” with the admissions of Mr. Bagshaw in his answers, satisfy me that the deceased did not intend to revoke No. 3, but wished the instruments taken together to be considered as her will.

I pronounce, therefore, for Nos. 3, 4, and 5, as containing together the will of the deceased.

DAMPIER and DAMPIER v. COLSON.—p. 54.

The application of a married sister to be joined in an administration with her two brothers, overruled.

JUDGMENT.

SIR JOHN NICHOLL.

The deceased died leaving a widow, two sons, and a daughter;—he made a will, appointing his wife executrix, and residuary legatee for life; and gave her the power of disposing of the residue among her children; but, if she made no disposition, then it was to go between them in thirds.—The widow is in a state of mental imbecility, so that she can neither take probate, nor at present make any disposition of the residue.

The parties before the Court are, the two sons and the daughter, the substituted residuary legatees.—The sons, Edward Dampier, and the Rev. John Dampier, pray the administration jointly to them.—The daughter, Mrs. Colson, who is a married woman, prays to be joined in the administration; to this the brothers object: Mrs. Colson then prays that a joint nominee may be fixed upon.

Now, *first*, the two sons, who are willing to take it together, have a majority of interests.

In the *next* place, it is not the practice of the Court to force a joint administration upon unwilling parties; and, therefore, it would not compel the brothers to admit Mrs. Colson to be joined with them.

In the *third* place, it is not the practice of the Court to grant from the residuary legatees, to a nominee, where the parties cannot agree.

It is stated that the sons are indebted to the estate, but I do not see the strength of that objection;—they must produce an inventory;—they must charge their debt as part of the property:—the other party will have as full means of investigating whether it is paid in part or not, as if she were to be joined with them, perhaps better. The administrators must give security;—I do not see what risk there is to the estate, or what disadvantage it is placed under.

But there is another ground which alone would guide the discretion of the Court, if there was nothing else to guide it; the deceased has made the two sons trustees for the daughter's share, for herself for life, and then for her children;—there is also some of the property given by will in the same manner to the two sons, in trust for Mrs. Colson; by appointing the sons administrators, they will have an opportunity of executing this trust; but if Mrs. Colson is joined with them, she will have the property at least jointly, and she and her husband may dissipate it, and the trust may be defeated:—it is clearly not the intention of the deceased that Mrs. Colson or her husband should have the possession even of this third, or the management of his property; the two sons are the testator's own trustees; they are his nominees.

I reject Mrs. Colson's petition, and decree administration with the will annexed, to Edward and John Dampier.

In respect to costs, I really see no ground on which Mrs. Colson contended for the administration;—I think this is rather a case which calls for costs, as the opposition is frivolous and unfounded.

Costs given.

REEVES v. FREELING.—p. 56.

The Court exercises a discretion as to the sort of inventory it requires from an administrator.

PROBATE of the will of John Reeves, had been granted to the executors, but was called in by a son of the deceased, who had been advanced in his father's lifetime, and was no further benefitted under the will than as a contingent legatee; the will was proved in solemn form of law, and probate decreed to the executors.

Lushington, for the executors, prayed costs.

Per Curiam.

The son had a right to put the executors on proof of the will; I shall certainly not give costs.

Swabey, for the son, prayed an inventory, and stated that the contingent interest of his party was sufficient to entitle him to it.

Lushington, contra, denied the right of the adverse party to an inventory; and said, that in this case it would be attended with great difficulty, as the deceased was engaged in a banking-house, and his profits would not be concluded till May, 1813.

JUDGMENT.

Sir JOHN NICHOLL.

I have known the Court exercise a judgment on these questions, particularly in complicated cases.

It cannot be necessary for the party to enter into all the accounts of

the banking-house; the Court will, in this instance, exercise a discretion as to the sort of inventory it will accept:—it cannot be difficult to make one out; there must be an account for the rest of the family; and though the person calling for the inventory has but a contingent interest, he has a right to a constat of the effects.

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BROUNCKER and COOKE v. BROUNCKER.—p. 57.

Probate refused to a codicil signed and executed.

LEWIS WILLIAM BROUNCKER, Esq. of Barford Hall, in the county of Wilts, died on the 29th of Jan. 1812. On the 21st of same month, he had executed a formal will of considerable length, drawn up by Mr. Cooke, his solicitor, containing a complete disposition of his property;—this will was propounded by the executors, and was not opposed; but a codicil, dated three days only subsequent to this instrument, was propounded also on the behalf of the younger children of the testator. The deceased left a widow and nine children; his personal property amounted to about 70,000*l*.

The codicil was as follows:—

Barford House,
Jan. 24th, 1812.

“I am desired by L. W. Brouncker, to request that his executors will make the fortunes of his eight younger children to consist of ten thousand pounds stock, instead of five thousand, which he had given them by a will made by George Cooke, Esq. and executed in the presence of the Rev. George Chandler, of Dalkeith House, (Scotland, Duke of Buckleughs) John Hooper, surgeon, of the village of Downton, and Margaret Hawes, governess to L. W. Brouncker’s children, on the 21st of January, one thousand eight hundred and twelve. The same to arise from the stock stated for the five thousand stock mentioned in the said will. The abovementioned will to continue in effect to all the other purposes therein contained.

“MARY STRODE.

“If the alteration for which these directions have been given has been already made, namely, five additional thousand pounds stock, this paper is not to be of any effect.

“MARY STRODE.

“Further added by L. W. Brouncker’s desire; this memorandum I consider as a codicil to my will.

“L. W. BROUNCKER.

“Witness, *Richard Fowler, M. D.*
Mary Strode.”

Jenner and Phillimore, in support of the codicil.

Swabey and Lushington, contra.

JUDGMENT.

Sir JOHN NICHOLL.

The deceased, Lewis William Brouncker, died on Wednesday, the 29th of January, 1812. The codicil propounded is dated on the 24th of January, 1812. The deceased is stated to have been possessed of a

very considerable fortune, about 70,000*l.* sterling, in money, and a landed estate worth about 4000*l.*, the whole producing about 3,500*l.* per annum. This estate is charged with two annuities, amounting to 160*l.* per annum; a settlement on his wife of 500*l.* per annum; and 2000*l.* generally on his younger children.

On the 21st of January, three days only before the date of the codicil, the deceased executed a complete and long will, in full form,—containing a just and proper disposition of his property;—it is of considerable length, and must have taken considerable time in making; even the draft which is before the Court has the appearance of having been prepared a considerable time. He had an eldest son and eight younger children:—by this will he gives an additional annuity to his wife of 500*l.*, making her provision 1000*l.* per annum, besides a legacy of 1000*l.*, and all his plate, linen, furniture, &c.; and he bequeaths 5000*l.* 3 per cents. to each of his younger children.

By the codicil now propounded, the fortune of the younger children is doubled; 5000*l.* 3 per cents. additional is given to them;—so that there are 80,000*l.* 3 per cents., nearly 50,000*l.* sterling, given to the younger children, which will not leave a sufficiency to cover the annuity to the widow, and the other charges on the estate;—and must leave the eldest son destitute.

It is pleaded that the deceased had a strong affection for his eldest son; there is no particular proof of this;—but it is clearly proved that he had no disaffection towards him; his affection is evinced by the will of the 21st January;—and this, from the provisions it contains, is decisive of a firm intention to make an eldest son;—it shows it to have been his deliberate and firm intention.

The question then is, whether the deceased was in possession of a sound and disposing memory at the time of making this codicil, sufficiently so, to effect the almost entire subversion of his solemn will, executed only four days before, and to leave his eldest son for the present destitute, or at best dependent on his mother during her life.

The presumption of law is strongly in favour of the executed will:—the Court must consider whether the capacity was adequate to the subsequent act:—the proof of the capacity must depend upon the nature of the act; and all circumstances must be taken together, to ascertain the real testamentary intentions.

The testator was very ill at his residence at Barford House, about nine miles from Salisbury;—his sister, Mrs. Strode, came from London to see him on the 23d of January;—he appears to have had great confidence in her:—he mentioned to her his having made his will;—he seemed perfectly satisfied with the provision made for his children;—he only doubted whether there was a sufficiency for his wife.

The next morning he sends for his sister,—is extremely eager for her arrival, (she had returned to Salisbury to sleep) asks repeatedly whether she was come,—a further conversation took place with her,—and he again said he had made a handsome provision for his children, and only doubts about his wife;—this shows that his mind was dwelling on the subject;—but there is no appearance of any change in respect to the distribution among his children;—still less, that any thing had arisen in his mind adverse to his eldest son.

The deceased then said, that he must exert his little remaining strength to transact some business respecting his brother, and for that

purpose wrote a draft for a person under whose care he was;—that business being done, his sister left him, “concluding that all the deceased’s worldly affairs were accomplished,”—she went down stairs to write some letters;—so that up to that moment there was not the least trace of the deceased’s being dissatisfied with the provision for his younger children.

It is material to see what was his condition and state during this previous transaction;—this is fully detailed in the evidence of Mrs. Strode, and a greater state of debility can hardly be imagined;—and the natural effect of his exertion was, that he should remain in an exhausted state;—and his mind of course more liable to wander. It is also proved, that before this time the deceased had occasional wanderings and deliriums;—he had the bed-clothes and bolster put at the bottom of the bed, and slept several hours in that mode. The apothecary says, he gave odd and eccentric directions;—and the servants who attended him speak to several instances of his mind wandering. He was so weak in body that when he was taken up it was necessary to fan him. Surely, in this state it is absolutely incumbent on the Court to be satisfied that the deceased fully comprehended the nature of an alteration made so suddenly, and in direct contradiction to the principles which had so long regulated his testamentary dispositions.

Within an hour after Mrs. Strode had left the deceased, under the impression that he had finished all his worldly arrangements, Mrs. Brouncker, the wife, came down in great haste and agitation to Mrs. Strode, and informed her that the deceased would have a codicil made to give 5000*l.* more to his younger children:—Mrs. Strode, I doubt not, with perfectly good intentions, but under a great agitation, instead of going up and taking instructions from the deceased, so as to satisfy herself that his memory and recollection were complete, and that he really understood the important change he was about to make in his will in respect to the provision for his younger children, with which, up to that moment, he had appeared satisfied, wrote the paper in question:—Mrs. Strode deposes that Mrs. Brouncker said, “He wishes you now to make a codicil; and, apparently much agitated, said, she must come directly, and Mrs. Brouncker said the codicil was for the purpose of making the addition of 5000*l.* to the fortune of the younger children;—and the deponent having some paper before her, in a rapid manner wrote the substance of what the said Harriet Brouncker then mentioned as the wishes of the deceased, and immediately proceeded with her into the deceased’s bed-room.” She continues to depose, “that she carried it to the deceased, who sat in an easy chair, and without any thing being said by the deceased or the deponent, she read over to him what she had written;—he asked her why she had not written it in the form of a codicil.” Not one word as to the contents, or the reason of the alteration;—nothing to supply the defect of instructions, and the two ladies themselves appear to have been in such agitation and hurry, as scarcely to have understood what had been intended:—there is nothing to satisfy the Court that the deceased was fully aware of the nature and extent of this alteration in the will; he merely takes notice of the form. Mrs. Strode goes on to relate “that from some observation that fell from the deceased she doubted whether he had not by his will made such additional provisions;” and he was very desirous that the will should be opened, which she strongly opposed, thinking “he would almost have

died before the transaction had been completed, and some one gave him wine on account of his exhausted state."

Now, what must have been the state of the deceased's mind, when he could not recollect so important an article respecting his will, made only three days before;—it is very unfortunate that this lady undertook the transaction, and opposed the looking into the will;—for, if there had not been so much haste; if the deceased had gone regularly through the transaction, the Court would have been better satisfied whether he did, or did not, really comprehend the nature of the act; the relation given seems to negative that he understood the act;—when he talks of this additional provision, it rather points to the addition (to 2000*l.* under the settlement) after his wife's death; and, therefore, to a single sum of 5000*l.*;—for, I do not see how it could properly be said that by will he had made an additional provision of 5000*l.* each, to the 5000*l.* given by the will itself, and exactly in the same manner:—this would be absurd, and it shows such a confusion of mind, that it is difficult to think he could form any intention which could safely be carried into effect as the intention of a sound mind:—the deceased was at least in a state of doubtful capacity.

Dr. Fowler, the deceased's physician, who has also subscribed the instrument, deposes, "that Mrs. Strode asked him in great haste to step into the deceased's room for a few minutes;—she said he was desirous of making a *slight* alteration in his will, and had desired her to draw up a codicil;—and it agitated her to death:—they went into the deceased's room,—Mrs. Strode, in the presence of the deceased, said, the deceased wished him to witness a codicil, and was merely making a trifling addition to the fortunes of his younger children;—the deponent then asked the deceased whether it would not be better to have three witnesses?—the deceased, apparently agitated and impatient, replied, 'it is not lands; it has nothing to do with lands—it is merely to make a trifling or small addition to the fortunes of younger children.' The deceased showed great eagerness to have it done;—the paper was placed on a table;—he proposed Mrs. Brouncker to be a witness:—the deceased, in an uncommonly hurried manner, and as if he was working himself up to make an effort, signed his name:—and the deponent and Mrs. Strode, without any thing further being said, signed their names."

To what does all this amount? that the deceased knew he was doing some testamentary act, so far as to be aware of something of these forms;—he could call it a codicil;—he knew it did not pass lands; and he could exert himself to sign his name:—but it does not satisfy me that he knew the important alteration he was making;—that he was doubling the fortunes of his younger children, and leaving his eldest son totally unprovided for: he hears Mrs. Strode describe it as a trifling addition; he repeats that it is a trifling addition to younger children: but, instead of that, it is doubling their fortunes; a bequest of 40,000*l.*; it shows that the deceased could not have comprehended it. There is not a single dictum from the deceased, either before or after this codicil, that he was dissatisfied with the provision made for his younger children: there is not one witness who will venture to state that the deceased was of perfect sound mind;—or, that he fully comprehended the nature and extent of the act;—it has every appearance of being the sudden thought of a wandering and disordered mind, in extreme weakness of body.

Upon the whole, the evidence is by no means such as satisfies me that the deceased was in possession of sufficient memory and recollection to understand the import of this codicil:—the presumption is in favour of the regular will, executed only three days before. The Court must be on its guard that the real intentions of the deceased are not defeated by the incautious act of the persons about him. I shall act more safely in adhering to the will, as the instrument which is most likely to carry into effect his real wishes and intentions; and I pronounce against the codicil.

ARCHES COURT OF CANTERBURY.

SMITH v. SMITH.—p. 67.

Where cruelty and adultery are both charged against a husband, it is not absolutely necessary to prove cruelty.

On the admission of a libel given in by the wife pleading cruelty and adultery against her husband.

Arnold and Lushington contra.

The charge of cruelty, if proved, would not amount to that which would entitle the party proceeding to a sentence;—it cannot assist the charge of adultery; therefore, all that part of the libel relating to cruelty should be rejected.

JUDGMENT.

SIR JOHN NICHOLL.

The libel is not objected to altogether;—the Court always considers whether the general substance is admissible; if it is, the smaller parts are not excluded. I do not know that the Court has ever laid down where cruelty and adultery are both charged, that it is absolutely necessary to prove the cruelty: it may be of consequence on the question of permanent alimony. In this case I think that the cruelty and adultery are combined together; for the adultery pleaded is of a nature to include cruelty.

Where the wife is the complainant, and the husband to pay the expenses on both sides, the Court will be on its guard not to admit matter that is irrelevant; but it does not appear here that the case is unnecessarily loaded, or containing any matter which may not be of use to assist the Court in its determination.

Libel admitted.

PREROGATIVE COURT OF CANTERBURY.

BROWNING v. REANE.—p. 69.

Administration of the effects of a wife refused to the husband on the ground that his marriage has been illegally contracted:—nullity of marriage established.

JUDGMENT.

SIR JOHN NICHOLL.

Mary Reane, otherwise White, died intestate, in Oct. 1810; James Reane demands administration to her effects as her husband. Thomas Browning, her nephew, and one of her next of kin, denies Reane to be her husband; not denying that a fact of marriage took place, but alleging that, at the time of that marriage being solemnized, the deceased was incapable, from mental deficiency, to contract a marriage.

The issue, therefore, in the cause, is, whether the deceased, at the time of the alleged marriage, was incapable of legally contracting it; and I am of opinion, that the person alleging that incapacity must prove it, a marriage having in fact been solemnized.

Upon the law of the case there is little question; and, without going back to ancient authorities, it may be sufficient to state what Mr. Justice Blackstone says on this subject:—“*a fourth incapacity is, want of reason; without a competent share of which, as no others, so neither can the matrimonial contract be valid. It was formerly adjudged that the issue of an idiot was legitimate, and, consequently, that his marriage was valid. A strange determination! since consent is absolutely requisite to matrimony; and neither idiots, nor lunatics, are capable of consenting to any thing; and, therefore, the civil law judged much more sensibly, when it made such deprivations of reason a previous impediment, though not a cause of divorce if they happened after marriage. And modern resolutions have adhered to the reason of the civil law, by determining that the marriage of a lunatic, not being in a lucid interval, was absolutely void.*”

Here then the law, and the good sense of the law, are clearly laid down; want of reason must, of course, invalidate a contract, and the most important contract of life, the very essence of which is consent. It is not material whether the want of consent arises from ideocy or lunacy, or from both combined: nor does it seem necessary, in this case, to enter into any disquisition of what is ideocy, and what is lunacy; complete ideocy, total fatuity from the birth, rarely occurs; a much more common case is, mental weakness and imbecility, increased as a person grows up and advances in age, from various supervening causes, so as to produce unsoundness of mind. Objects of this sort have occurred to the observation of most people. If the incapacity be such, arising from either, or both causes, that the party is incapable of understanding the nature of the contract itself, and incapable, from mental imbecility, to take care of his or her own person and property, such an individual cannot dispose of her person and property by the matrimonial contract, any more than by any other contract. The exact line of separation between reason and incapacity may be difficult to be found and marked out in the abstract; though it may not be difficult, in most cases, to decide upon the result of the circumstances; and this appears to be a case of that description, the circumstances being such as to leave no doubt upon my mind.

The case, as laid in the second and fifth articles of the plea, is to this effect; that she was always from her youth a silly or foolish person, possessing a very weak understanding, which nearly approached to ideocy, and was considered to be, and treated as such; that as she grew older her mental faculties more rapidly decreased, insomuch that for several years, and more especially for the last three years of her life, she was

wholly incapable of governing, or taking care of herself or affairs; and that, by reason of her weak and decayed state of mind, she was incapable of understanding the nature of courtship and addresses, or of consenting and agreeing to be married.

It is not denied that, if this case is made out by the circumstances, that the marriage was in law invalid: it becomes, therefore, necessary to examine the circumstances which are proved in respect to the state and condition of the deceased, and the transaction itself.

The age of the deceased is proved to be upwards of seventy; the age of the man about forty: it is not controverted that she became possessed of considerable property by her brother's death; she was the daughter of a baker: it does not appear that she was, in her infancy, in such a state as to exclude all hope of her instruction or improvement, for she was sent to school; but it does not seem that she was ever able to read, or to write her own name legibly. She was put out as an apprentice to a mantua-maker; and it is to be inferred from this, that she was thought capable of learning to gain her own livelihood: but the fact is, she never did learn her business, but was employed as a servant in the house, in going on errands, and looking after the children.

Mr. Blissett, examined by the husband, says,

“He lodged, about thirty years ago, in the house where the deceased served her apprenticeship, and where she was acting as servant; that she twice called upon him since, about five, and about three months before her marriage; she told him she was going to be married; and appeared then as capable as when he formerly knew her.” But he enters into no particulars, of what her state was when he formerly knew her. He admits, upon an interrogatory, “That she was of a weak understanding, but he considered her as capable of taking care of herself.” He had not seen her for nearly forty years; and, if he is correct in dates, the first of these visits, viz. about five months before her marriage, when she said she was going to be married, was before Reane knew her; his acquaintance having commenced in December, and she was married on the second of March following: whether this man is Blissett the player, mentioned in another part of the evidence, and whether it be true that the deceased had a child by Blissett the player, is not proved in any satisfactory manner; if it were, this man's credit as a witness would not rest on any solid foundation; but, taking it otherwise, this evidence is extremely slight, and too little instructed with circumstances for the Court to rely upon it. Eighteen or nineteen witnesses have been examined, who have known the deceased at different periods of her life, some from her infancy, others at a more advanced period; but it is the latter part of her life which is most important. The statement of some of this evidence will afford the best reasons for the sentence the Court is about to give.

Mary Silcox, aged eighty-five, deposes, “that she has lived all her life in Avon-street, Bath. White, a baker, the father of the deceased, lived in the same street; she has known her from five years old; she went to school with three sisters of the deponent's; about ten or twelve she was put apprentice to one Harper, but on account of her weakness of mind, instead of being taught the business, she was put to mind Harper's children. She went afterwards to live with a Mrs. Fry, and used occasionally to call at the deponent's house. On the death of Mrs. Fry, twelve or fourteen years ago, she for some years, while living at differ-

ent places, continued to call on the deponent, and complained of being starved; and out of compassion she took her to live in her house, about five years ago, where she continued three years; and about two years ago one Mrs. Physic took her away, and placed her in some shop, as she told the deponent, and where she still continued to call; the deceased was always from her youth a silly or foolish person, possessing a very weak understanding, approaching nearly to ideocy, and as such was treated, and her mental faculties more rapidly decreased as she grew older; during the last years of her life she was wholly incapable of governing or taking care of herself or her affairs; no rational talk could be had with her, for where any one spoke to her, or asked her any question, she would repeat the words in a silly irrational manner, instead of replying to the question; that she could not sit in a place for five minutes together, but when at meals would get up from her seat, and run about the room, and when the deponent said to her, 'Molly, you have not eat half your victuals,' she would say she had enough, and would not abide in the house longer than to have her meals. The deponent being confined a good deal by gout, had not an opportunity of seeing her from home: she has seen her pull up her petticoats, and expose her person; and she was such a fool she would not mind making water before any person; she used very often to want to take the deponent's husband round the neck; she was worse in her conduct, and more silly, after the death of her brother than before; that she never could be made sensible of her conduct, whatever might be said to her, even in the lifetime of her brother, who died about five years ago, and from whom deponent received a remittance of 20*l.* a year for boarding and lodging his sister."

Mary Turner "knew the deceased as long as she can remember; she was a young woman when the deponent was a girl; their respective fathers had dealings together: the deceased was in the habit of coming to the deponent's house, and would help herself to any thing as if she was at home. Many years ago the deceased's brother desired her to look after his sister, which she accordingly did, and she used to come to her; after which, by his desire, she was placed at Weston, near Bath; she clothed her to go to this lodging, stripping her the same as a child: she lodged in different places in Bath with Mrs. Viston, Mrs. Bristow, and another person who took Mrs. Bristow's house. She was in the habit of coming to the defendant, and she saw a great deal of her till a few days prior to the marriage. From her acquaintance with her she is enabled to depose that the deceased was from her youth a silly or foolish person, possessing a very weak understanding, nearly approaching to ideocy, not sensible enough to take care of herself, and she was always so considered and treated by her own family: after the death of her brother, she became worse, or her mental faculties more rapidly decreased, notions of her being possessed of a great property being put into her head, which were too much for her; she would sometimes repeat questions, would get up in the middle of meals without cause; would run about the markets and streets of Bath. Seeing her ill used, the deponent has several times taken her home, and finding her violent she would be obliged to shake her; boys and idle persons used to follow her, calling out, 'Molly White, give a pinch of snuff, where is the fisherman,' alluding to a man in the market, of whom she was very fond, and who could not do his business sometimes for her. The person with whom she was placed, at Weston, signified that she was so troublesome she

could not keep her: in deponent's opinion she was totally devoid of common understanding, and incapable of comprehending the contract of marriage, or giving a rational consent thereto."

On third additional interrogatory, this witness states, "that George White paid for common necessities for the deceased till his death; after which Mr. Physic, for Mr. Browning, engaged with some person to provide for her: Mr. Browning frequently gave the respondent money to buy snuff for her."

Thomas Field "sells fish at the Bath market; about two or three years ago he first came to know the deceased by her asking him the price of fish; but he, concluding she did not want any, and observing her take snuff, asked her for some, which she gave him; that from that time for many months she was continually coming to the market, sometimes twenty times a-day, and used always to come up to the deponent, whom she frequently followed to a public-house: he used then to hear her called Mrs. Field, which she would repeat in a very silly way: he first heard her called Mrs. White by one Mrs. Turner, who had the care of her, and used to come to drive her out of the market; she used to say to deponent, 'Will you marry me?' and on his saying to her, 'When will you marry me?' she would repeat the very words. When she came to the public-house she would drink the beer of any one; she was a nuisance in the market, though she was worse sometimes than others; for if he did not offer to push her away and talked to amuse her, she would be quiet; he used to pretend to be asleep, and she used to come up and offer to kiss him, and he having flour in his mouth for the purpose, would spout it over her: he considered her as a silly or foolish person, of a very weak understanding, which approached nearly to ideocy: she was not sensible of the impropriety of her conduct, though sometimes a little steadier than at others, and would take an answer and go away when she was told: he believes she was incapable of consenting to marriage, and would have married him fifty times over."

Jane Bristow "knew the deceased eleven years ago, when she lived with Mrs. Fry, in apartments in St. John's hospital; the deceased was then in poor circumstances, lived with Mrs. Fry, her aunt, on an allowance from her brother: on death of Mrs. Fry, the deponent succeeded to her apartment: the deceased to whom she was in the habit of giving a penny to buy snuff, used to come daily to her, as well as to others in the hospital, till the day preceding her marriage." She then proceeds to give the same account of her conduct and understanding that the other witnesses have given. There are two other women of the name of Light, who lived in apartments in this almshouse, and knew the deceased seventeen or eighteen years, who give exactly the same account. One of them says, also, "that she would come into their apartments when they were drinking tea, take up their cups, and drink their tea; she would take things without being asked; she was guilty of indecencies, but not aware of their impropriety; was sometimes turned out of the apartment, but would return again in a short time; and that she often talked of going to be married, but could not say to whom."

Anne Bristow deposes, "that about Lady-day, 1808, in consequence of an agreement between her husband, brother, and Mr. Physic, the deceased came to board with them, and continued six months; she used to go out early in the morning, but return to meals, and to go to bed. The deponent, being desirous of getting rid of her, agreed with another

woman to take her, but she still continued to intrude herself into the house; she found the deceased to be a silly foolish person, approaching nearly to ideocy; that she never could have thought she would have been half so bad, till she came to live with her; latterly she was worse, and her faculties rapidly decreasing, she was incapable of taking care of herself. She never attempted to clean herself; she never answered any question put to her, but in a silly irrational manner repeated the question that had been put to her; she never sat still a moment; in the streets the children would hoot her, and pelt her with dirt, and pull her clothes off her back; that she would pull up her petticoats, and expose her person in the most indecent manner; if talked to about it, she would laugh and repeat the words. She would walk about her rooms and hide candles and other things: on account of her childish and extravagant conduct, she refused to continue the care of the deceased, who was always treated, while under her care, as a person whose understanding was wholly deranged, or unsound and imbecile, that she had not sufficient to take care of herself and her affairs. That on her coming for snuff, the day before her marriage, she said, 'Mrs. White, I hear you are going to be married;' the deceased replied 'Going to be married, married.' She believes she was at that time quite incapable of understanding the nature of marriage, and devoid of understanding."

Mr. Bristow, the husband of the last witness, fully confirms this account.

At the time of the marriage, the deceased lived under the care of Mr. and Mrs. Eyles; they and their maid-servant, Sarah Edwards, have been examined, and they continue the same account of the condition of the deceased, down to the very day of her marriage.

Eliz. Eyles says,—“Browning worked for her husband, and boarded with them; and in consequence of his wishing to have a creditable place for the deceased, and saying he would allow 100*l.* a year for taking care of her, the deponent was induced to undertake the same; but she had not been a week in the house before the deponent signified that in consequence of her conduct she could not stay there: she continued there eleven weeks, during which time the deponent saw, and was constantly with her; she used to wash her and put her to bed, for the servant could not manage her at all.” She then gives the same account of her conduct as the other witnesses, and says, “that she could have been made to marry a boy, or any one, or to believe if a post was dressed in man’s clothes, that she was married, and she used to have a great notion of being married. About eight o’clock in the evening before she was married, she came home very much intoxicated; and the deponent did herself, on account of her ill-using the servant, put her to bed, and never afterwards saw her:—she heard her early the next morning about her room, and in the course of the day, missing her, enquired at Emery’s, and heard she was married.” This account is confirmed by the husband and servant.

In the facts which these witnesses relate, and the conclusions which they draw from these facts, they are perfectly concurrent; and if they have not given a false account of the conduct of the deceased, and totally deceived themselves, it is impossible not to agree with them in their inferences. A more complete picture of a poor crazy old woman cannot well be drawn than is here exposed;—totally incapable of doing any one rational act, and never having through life, but particularly in

the latter part of it, held a rational conversation, or done any one act in the management of herself or her property. Any attempt to explain this evidence by the deceased's voraciousness or love of drinking, must totally fail;—in the first place, this sort of voraciousness is rather a sign of the defect of the mind, and frequently accompanies it:—occasional intoxication will as little explain it,—as the witnesses are persons who did not see her occasionally, but who were with her at all times and all seasons, and state her to have been always foolish and deranged. Crazy persons, not having lost the use of speech, and possessing the external senses, can walk about and go of errands, and express their wishes and wants, and have some general impressions; but this poor creature's capacity, especially in the latter period of her life, seems to have been further removed from reason than many animals of the brute creation.

It is necessary, however, to look into the evidence on the other side:—on the first allegation, merely pleading the fact of the marriage, the Court could not expect much that was satisfactory;—if the marriage was brought about by a fraudulent confederacy, there would be two descriptions of persons present at it;—the parties confederating; and those whose presence was necessary, and who might be deceived and imposed upon. Six witnesses have been examined as to the marriage; five of whom were actually present at it. Mr. and Mrs. Emery are two of them, who kept a retail shop at Bath, where the deceased used to buy snuff;—they are the friends of the asserted husband;—the whole matter of the marriage was contrived at their house;—there the courtship, whatever it was, was carried on;—from thence they went to the church, and thither they returned after the ceremony. It is admitted that none of the friends or connexions of the deceased were in any degree privy to the transaction:—clandestinity is the usual concomitant of fraud. Emery admits her great infirmities, her habit of drinking, and her indecent behaviour,—but he attributes all her irregularities to her habit of drinking;—he admits, that on the evening of the marriage he went with the parties to the Cross Hands, where the old woman was extremely intoxicated, and that on the bridal-night they all three slept in a double-bedded room. Here then is a young man, in the middle of life, marrying an old woman of seventy, an habitual drunkard, and labouring under great infirmities, but possessed of a considerable property, which is to be acquired by this marriage, without the knowledge of any of her friends, or any settlement or security whatever. Upon uncontroverted facts the case has an unfavourable aspect, and has much the appearance of fraud and confederacy. Motives will not invalidate the act, however improper it may be, if the party was capable of acting for herself; but they excite the suspicion of the Court, and it will require evidence of capacity from other witnesses not concerned in the transaction; nor will it think the testimony of Mr. and Mrs. Emery deserving of much credit when it is opposed to a cloud of witnesses who give a description of the state and condition of the deceased, irreconcilable with their account.

“Martha Solway never saw the deceased but once before the marriage, did not know her name, and has never seen her since; she was asked to attend the marriage by Mrs. Emery;”—whether she is to be regarded as a confederate, or as a person imposed upon, her evidence is of no weight, for she says that the deceased and the other persons held no conversation; and the single observation she recollects, is that when

the witness offered the deceased her arm, she said, "No, she would take her husband's." This goes affirmatively a very short way; but negatively, it is strong, that during the time she was in the deceased's company she can set forth no other expression that she used, and can assert that she entered into no conversation. The remaining three witnesses are the clergyman, the clerk, and the sexton; and the main fact relied upon is, that she went through the ceremony;—that alone cannot be held sufficient; if it were, no marriage could be invalidated, unless all the parties were confederates in the fraud; there is no reason to charge the officiating persons as confederates, but as persons deceived. He must be a careless observer of human life who does not know that foolish crazy persons, of this description, have yet some degree of cunning and docility;—this poor creature, whose notion was to be married, and whose common question was, "Will you marry me?" by a very little tuition, might be trained and instructed to go through the formality of the ceremony, though wholly incapable of understanding the marriage contract, without persons, previously unacquainted with her, discovering her incapacity; the solemnity of place, and the occasion, of which she might have some general impression, would render her more tractable and orderly. Her appearance, however, did not wholly escape the notice of the clergyman, though he was lulled by the answer given to his enquiries.

Dr. Phillot says, in answer to the fourth interrogation, "That previous to the ceremony he observed to the sexton that she was rather weak; and his answer was, that he believed her a well disposed woman, and that she attended prayers at church every day, always behaving herself with decency." The mere circumstance, however, of attending church constantly, and behaving with decency, is no proof of capacity, for it has come under my own observation that a person more nearly approaching to absolute ideocy than any which has ever happened to occur to my notice, always attended church, and behaved decently;—the sexton does not pretend ever to have had any conversation with her. It appears also that the deceased had some degree of deafness, and thickness of speech; and that at the beginning of the ceremony, where she was to repeat after the clergyman, he was apprized of this defect, in order that he might speak louder. These defects would further lull his observation, and induce him to attribute her appearance to them rather than to want of capacity. *Dr. Phillot* proceeds, "That after the marriage he asked the clerk who she was; who told him she formerly had an illegitimate child by *Blissett*;—that he understood she had an annuity, and he supposed the man must have married her for that;—he asked the deceased, if she could write, to sign the register; she said she could;—but, upon seeing the name unintelligibly written, he added, '*the mark of Mary White.*'"

Skrine, the sexton, says, "that he never spoke to her till the time of her marriage, on which occasion she said to the respondent, '*This is my husband,*' pointing to the prosecutor, and smiling."

This is the whole of the evidence, applying to the condition of the deceased at the time of the marriage; and the circumstances are so equivocal and unsatisfactory that the Court would have no great difficulty in its conclusion, if it stood on these alone. But whatever might have been that difficulty, it would be removed by the subsequent part of the case. *Reane* has had a full opportunity of producing other evi-

dence, and going into proof which should repel that of the next of kin, and show that they had given a false representation, or come to a false conclusion. And what makes the absence of such proof more forcible, is that there could be no difficulty in producing it, if the deceased had been a capable person. The deceased did not live in a state of seclusion;—of all persons she seems to have been most the object of observation; the whole of her life was passed in Bath;—she was never at home but at meals; the rest was passed in the abbey church,—in the market-place,—in the public streets of that great city;—in these she was every day, and the whole day. If she had been capable of taking care of herself, or of the most ordinary conversation, fifty or five hundred witnesses might have been produced to repel the evidence produced by Browning. Reane did give in a long allegation contradictory of the case set up by the adverse party:—upon that allegation he has examined six witnesses;—of these six, two only had ever seen the deceased before the marriage; one of them is Mr. Blissott, who has been already noticed, who had seen her only twice within the last 30 years. The other is a day-labourer's wife, brought from Upton, in Gloucestershire, who says, “that she has known the deceased for 30 years, and to the time of her death: after her brother's death the deceased was generally employed in going about on errands at Bath, where she often met her:—that she talked as other people would do, and did not repeat questions.” This witness, it is to be observed, lived 15 miles from Bath.

The absence of evidence, under the circumstances, is the strongest possible confirmation of the evidence given by the next of kin.—Another species of evidence, always the most forcible, is the conduct of the deceased herself;—if, throughout life, she had managed herself and her affairs, it would have afforded proof of her capacity: though not in actual confinement, she appears to have been in a state of pupillage, never a person *sui juris*—not proved to have done any one act of business, or to have entered into a contract of any sort. She was put out an apprentice, but fails to learn her business so as to get her own livelihood. Her brother supports her with common necessities, not by allowing, or paying her money, but by paying other persons to take care of her. After his death, though she became entitled to considerable property, yet she never had the use or possession of it; it is her nephew, or his agent, Mr. Physic, who agrees with people to take care of her. She is washed, and cleaned, and put to bed by others.

Having taken this view of the case up to the time of the marriage, it seems unnecessary to pursue it further with any degree of detail; but the sequel is exactly of the same character: the same strength of evidence on one side, coupled with conduct, and encountered by nothing of any force or effect on the other.

Upon the evening of the marriage Reane and his friend Emery take the old woman in a return chaise, to an inn about twelve miles from Bath, called the Cross Hands: it is not worth while to examine whether she was, or was not intoxicated when she arrived there, but she is not treated as a person having understanding;—she joins in no conversation;—she is carried up to bed, and undressed by the chambermaid;—she will have her bonnet laid on the pillow. Reane and Emery, it is admitted, slept in the same room with her; though Emery denied that they slept in the same bed;—the next morning very early they carry her off in a chaise, towards Gloucester; Reane having been waiter at an inn there, and not

choosing to exhibit her, they leave her at a little public house, a few miles from that town. On the following day they return to the Cross Hands, and again sleep there in the same two-bedded room. On the next morning Reane applies to the landlord to get some person to take charge of the deceased for a few days till he could provide a proper place for her. The landlord having known Mr. White, the brother, who used to mention to him his foolish sister, out of respect to him offers to take charge of her for a few days;—Reane accordingly goes away, leaving her in his hands. While there, she conducts herself in every respect as a silly childish person, and is treated as such, and they are obliged constantly to watch her; she would go into all the rooms of the house, and take whatever belonged to the guests. She went up to all the carriages that stopped;—she accosted the coachmen and drivers, and strangers, clasped them round the neck, and called them her husband:—she asked her for “money, money,” and the landlord gave her a post-horse ticket; she put it up safely, and supposed it to be a bank-note. In short she became such a nuisance, that on Thursday the landlord wrote to Emery to desire Reane to come and fetch her away; and on Saturday Reane, with another man, (who turns out to be a sheriff’s officer) fetched the deceased away, and carried her to Bristol.

These circumstances are very fully proved by several witnesses; at the inn at Bristol, which was kept by a friend of Reane’s, the deceased remained several months;—there a young woman, named Sarah Silon, was hired to look after her, as a childish person, and she is treated as such both by Reane and Mr. and Mrs. Griffiths. Silon gives an account of the deceased’s conduct exactly corresponding with that of the Bath witnesses. She is confirmed by her mother, to whose house, at the end of six months, the deceased was removed, and there she died. They are corroborated by Arnold, a whitesmith, living in the neighbourhood, to whom she appeared a silly person, always attended by Sarah Silon, as a guard. Griffiths and Peachey are produced to represent the deceased at this time as, in their opinion, capable; they are the agents and partisans of Reane, and their depositions make no great impression on my mind. Mr. Scott, a surgeon, who attended the deceased three times, about five months after her marriage, for a contusion in the temple, and an inflammation in the eye, deposes,—“That he observed no symptoms of insanity or idiotism: that the deceased being rather deaf, he spoke loud, and she seemed attentive, and answered in a rational manner; but having a fulness of mouth, disenabled her to articulate her words perfectly; that she was attended by a female servant; that Reane appeared attentive to her, and she was very partial to him.”

He does not state what his conversation with her was, so as to enable the Court to judge whether he had any grounds to form his opinion: it is mere negative evidence, that he did not discover her incapacity. Attending her for an external hurt, it was not necessary that he should ask questions about her mental infirmity;—the deceased also, being rather deaf, and having a thickness of speech, and the husband and attendant being both present, it is not at all probable that such conversation should have taken place between the surgeon and the deceased as should have enabled him to judge of the state of her mind.

With respect to the whole of the transaction, there is the same deficiency of evidence as before. No person can set forth the particulars of one rational conversation;—no person appears, who has had any so-

cial intercourse with her; who has ever visited her, or has been visited by her;—no one act of business is spoken to;—no buying, or selling, or hiring, or ordering;—no appearance of self-dominion, of the care and management of herself. But as the brother, and afterwards the nephew, had taken care of her before marriage, now Reane takes care of her, providing the common necessities of life for her subsistence.

In addition to all this a writ de lunatico inquirendo was taken out and executed six months after her marriage; the verdict was found by a most respectable jury, consisting of twenty-one persons;—the deceased was produced in person—Reane's counsel and solicitor attended; and, after examining her in person, they found her incapable from two years antecedent. No attempt has been made to impeach this verdict in Chancery; nor have the counsel, or the solicitor, been examined in this cause. If this inquisition had been taken before the marriage, it would by the statute 15 Geo. 2. c. 30, have been conclusive against it; though not conclusive certainly against a will. But, taken after the marriage, and under the circumstances stated, the deceased having been produced in person before the jury, it is a strong confirmation, if confirmation were wanting, of the other evidence.

Without the verdict, however, and looking only to the evidence adduced in this cause; in the view I have taken of it, I have no hesitation in pronouncing against the interest of the asserted husband; and, under the impression I have received, it would be quite inconsistent with the conclusion to which I have come on the merits of the case, not to make it a part of the decree to condemn Mr. Reane in costs; and accordingly I condemn him in costs.

ARCHES COURT OF CANTERBURY.

TURNER, falsely called FELTON, v. FELTON.—p. 92.

Nullity of marriage by reason of the minority of the husband, established at the suit of the wife.

OTWAY v. OTWAY.—p. 95.

(By letters of request from the Consistory Court of Peterborough.)

A separation a mensa et thoro decreed, on account of the cruelty and adultery of the husband.

SARAH CAVE, the daughter and heiress of Sir Thomas Cave, Bart. of Stanford Hall, in the county of Northampton, was married on the 25th of Feb. 1790, to Henry Otway, Esq. The parties cohabited together till the 13th July, 1811, when Mrs. Otway quitted her husband's house; and on the 18th of November, 1811, she took out a citation against him in a suit for divorce, on account of cruelty and adultery. Her charges against him were set forth in a libel of twenty-five

articles;—sixteen witnesses were examined in support of them: The answers of Mr. Otway were taken to the libel; and interrogatories were put on his part to the witnesses produced by his wife, but he gave no responsive plea.

Swabey and Jenner for Mrs. Otway.

Arnold and Adams contra.

JUDGMENT.

SIR JOHN NICHOLL.

This is a suit brought by Sarah Otway for a divorce, on account of the cruelty and adultery of her husband: the marriage took place in 1790; the parties cohabited together chiefly at Stanford Hall, till July, 1811. The husband was a country gentleman; the wife, the daughter of Sir Thomas Cave, Bart.;—she had nine children by him. This gentleman, living with his wife, with daughters nearly grown up, is proved to have made his own house a brothel.

Mary Lawrence, a young girl not eighteen, was debauched by him; the fact is incontestibly proved;—so that on this fact alone the wife would be entitled to a divorce.

Another fact amounts nearly to a rape; the account given by the woman is confirmed by another person to whom it had been admitted. A third instance is proved by Gaudern, his steward, who was employed to get lodgings, and to maintain the party.

This was in June, 1811, just before the separation.

A more profligate case of adultery cannot be made out,—this being 211. so fully proved, it is not necessary to scan with exactness the charge of 2^d 208 cruelty—acts of personal violence are not proved—but a series of most unwarrantable behaviour is. The case cited shows that it was not necessary to prove acts of personal violence to substantiate a charge of cruelty;—it is the acknowledged doctrine that danger to the person and health is sufficient. The wife pleads a state of delicate health, this one of her interrogatories is said to contradict:—she might have been strong originally, but after having had nine children, and borne such treatment for so many years, it was natural she should become nervous. *Edw. 24*

Many of the servants who have been examined prove Mr. Otway to have been in the habit of putting himself into passions, of following her from room to room, abusing her, calling her by the most opprobrious names, accusing her of adultery and incest. I do not consider this as mere abuse, it implies menace.

Part of the evidence on the fourth article is objected to. I do not consider it (a) (as it has been contended to be) a mere general article not to be examined to, or as merely going to the character of the party, which is now discontinued in practice; but it pleads the habits of the husband in abusing his wife, and in that view it is proper to be examined to:—it might have been met by the husband by pleading that such was not his habit. Therefore, I consider this evidence as properly taken. There appears to have been no provocation whatever on the

(a) The 4th article pleaded "That shortly after the marriage the said Henry 3. 3. 3. 1. 1. Otway began to treat his wife, who was of a very delicate constitution, with indignity, severity, and cruelty; abused, and called her opprobrious names; swore 1. 2. 3. 4. 5. at her, spit in her face, and threatened to beat her, to pull her nose from off her face, and to shoot her; and ordered her to quit his house, and declared he was 2. 3. determined she should go."

part of the wife; all the witnesses state this upon the interrogatories, except Gaudern, his steward, who has been brought before the Court by a compulsory. Mrs. Otway has been proved to have been so much terrified and alarmed by his conduct as twice to have quitted the house; she came back, it is true; but this is not extraordinary, for she had seven children;—but her health has been materially affected:—she had fits afterwards from his violent conduct, and he would not suffer her to have medical attendance till he was told she was in danger. The apothecary says, he put himself in such passions as to alarm him lest he should commit violence;—then what must have been the fear of a nervous woman?—she declared her fears for her personal safety; and on one occasion on recovering from a fainting fit she exclaimed, “Do not let him come near me.” So Jackson speaks to a menace, and his saying “I will murder you;”—the next morning after this she quitted the house. He had been in a passion about his daughter’s going out. In the deposition of the witness who speaks to this fact, the menace is not mentioned. On the interrogatories he is asked if he believes Mrs. Otway quitted the house on apprehension of ill-treatment; and, on his being called upon to speak more particularly, he states the menace.

It is objected that she could have no apprehensions, for she had lived with him 20 years, and no damage had ensued;—but I have yet to learn that such passions, so indulged in, do not increase.

If no adultery had been proved, I am not prepared to say that a sufficient ground has not been shown for a separation;—but the adultery in this case is connected with the cruelty: the Court cannot separate the one from the other.

I pronounce for the separation as prayed.

PREROGATIVE COURT OF CANTERBURY.

WILLIAMS v. WILKINS.—p. 100.

Cæteris paribus, a man accustomed to business preferred as an administrator.

JUDGMENT.

SIR JOHN NICHOLL.

Twelve persons are entitled in distribution,—*cæteris paribus*, a man of business is more proper. The parties applying for administration are Mrs. Williams, who lived with the deceased, and managed his affairs; and Mr. Wilkins, who was his partner in a banking-house. The Court would not willingly give any person a power of looking into the affairs of this banking-house. There is no imputation against Mr. Wilkins;—it is not likely he or his partners would make up a false account;—by far the majority of the next of kin are satisfied with Mr. Wilkins.

It has been relied upon in argument, that in a former will he had left Mrs. Williams property;—but he had abandoned that will, and consequently that intention:—the circumstance, therefore, is immaterial. The point now is, not whom the deceased would have chosen for his administrators, but who is most proper for the office. Eight out of twelve of the next of kin are for Mr. Wilkins;—three are silent;—

though this expression of their opinion is not binding on the Court; still, unless the person on whom the majority fixes, is an improper person, it outweighs the other considerations which have been urged.

Mr. Wilkins I think the most proper person to have the administration; and I decree it to him.

CONSISTORY COURT OF LONDON.

DOBBYN v. CORNECK falsely calling himself DOBBYN.—p. 102.

A libel pleading the interposition in banns of a christian name by which the woman had not been known, as a ground of nullity, admitted to proof.

ARCHES COURT OF CANTERBURY.

COLE v. CORDER.—p. 106.

(An Appeal from the Commissary Court of Surry.)

In defamation suits, it is not necessary, that two witnesses should speak to the same words being uttered in precisely the same terms.

OTWAY v. OTWAY.—p. 109.

Permanent alimony,

2 d. 10 s.

JUDGMENT.

SIR JOHN NICHOLL.

10 Mays, 39.

In this case, Mrs. Otway has succeeded in obtaining a sentence of ¹⁷⁸ separation from her husband in a suit brought against him for cruelty and adultery.

The question of permanent alimony was reserved, and now comes before the Court for its decision, and it is my duty to allot to the wife out of the joint income a fit allowance for her separate maintenance.

The principles, upon which the Court is to exercise its discretion have been so recently laid down in the case of *Cooke v. Cooke*, ante, 178, that I do not think it necessary to repeat them again at any length.

Undoubtedly, a much larger allowance is to be made for permanent alimony, than for alimony pending suit;—the delinquency of the husband is now established; the wife is the injured party:—she is separated from the comfort of matrimonial society, from the society of her family, not by the act of Providence, but by the misconduct of her husband;—she must be liberally supported. The law has laid down no exact proportion;—it gives sometimes a third,—sometimes a moiety; according to circumstances.

In Lord *Pomfret's* case the income was 12,000*l.* per annum, the alimony given was 4,000*l.*: in that case the larger part of the fortune had come from the wife, and there was no family;—but he was a peer, and had that rank and dignity to support.

179. In *Taylor v. Taylor*, Arches, May 14, 1796, a moiety—in *Cooke v.*
178. *Cooke*, Arches, June 25, 1812, ante, 178, about a moiety, were given—in these cases there were no children.

In the present case the joint income amounts to 5,500*l.* per annum. The greater part of this property came from the wife—the delinquency of the husband is very gross. I should be disposed to give as large a proportion as in any case;—if no third parties were concerned, I should give a full moiety—but there are six children, two sons and four daughters, whom the father is bound to maintain and educate;—the suitable education for such a family will be a considerable expense;—supposing that deducted, the sum I shall allot will give the wife about a moiety of the remainder.

I shall allot 2,000*l.* per annum to be paid quarterly from the date of the sentence.

It appears that there are deductions from the estate from two jointures of 1,500*l.* each; when they fall in, it will be open to the wife to apply for an increase of alimony.

CONSISTORY COURT OF LONDON.

HARRIS v. HARRIS.—p. 111.

The cruelty of the husband established, and a separation a mensa et thoro decreed at the suit of the wife.

JUDGMENT.

SIR WILLIAM SCOTT.

This is a suit for separation by reason of cruelty, brought by the wife:—There is no defensive allegation on the part of the husband. It is not the habit of the Court to interfere in ordinary domestic quarrels; there must be something which makes cohabitation unsafe; for there may be much unhappiness from unkind treatment and from violent and abusive language; but the Court will not interfere—it must leave parties to the correction of their own judgment—they must bear as well as they can the consequences of their own choice.

Words of menace are different; if they are likely to be carried into effect, the Court is called upon to prevent their being carried on to mischief.—Where blows are resorted to, the case is still more aggravated, there mischief is actually done, or inflicted to a certain degree.

In the present case it is impossible not to say that there is that species of misconduct which the Court notices.

It is proved that for a considerable time the husband used towards his wife words of the most insulting nature; and that they were constantly used.—This is proved by the evidence of the servants, who appear to give impartial testimony, allowing the husband credit for affection to his children, but stating his misconduct towards his wife. I see nothing to lead me to impute undue favour or partiality towards him.

The first matter complained of is an actual blow, though there is no

direct evidence of it. What leaves the Court fully satisfied that it did occur, is the blow in 1803. Her two sisters say that at that period she abstained from her usual visits to them for some time. When she came, they saw marks, and asked her the cause of them; she declined at first to answer their questions, and did not appear eager to complain, but when pressed she said she had received a blow from her husband with "a poker:"—this confession of her's confirms the statement made at a ^{2/5} later time, that her husband had struck her before, which must either allude to this blow, or it adds to the number of acts of violence complained of.—She bore all with the patience required of a wife—she was degraded from the management of her family;—dressed not suitably to her situation in life;—obliged to resort to the charity of her own family for a supply of money.—"Fool," "Devil," and "Liar," were the \times best terms applied to her:—words of menace are also proved,—he would threaten to throw a knife in her face, when he had a knife in his \times hand;—he would threaten to knock her head off; words which to a \times mind of greater firmness than hers would occasion alarm.

It has been suggested that she had habits of contracting debts which justified him in taking the management of the family from her; but when I see the manner in which she was kept, as to her own clothes, I do not think these habits others than the husband himself occasioned, if they are true; but they are not satisfactorily proved.

The subsequent facts are clearly established: On the 11th of Aug. there was a quarrel on account of the allowance her father had given her for her own accommodation;—the husband wanted to apply this to the use of the family. I do not see that her application of it was other than was intended by her father.

On Sept. 11. there is satisfactory evidence of a blow from a tea-cup; \times the child came down stairs, and said her father had thrown a tea-cup at her mother—the witness went up stairs, and found the cup broken, and her face bleeding—he asked the witness what she had heard about it—she told him, and he did not deny the statement—his silence here leaves no doubt of the fact.

On the 14th of Oct. was the last outrage which led to their separation; it happened in the presence of the husband's sister;—the dispute arose about the testamentary dispositions of her father—it is a singular circumstance that the sister says she leaned her head on her hand, and did not see the parties. The husband, however, by his own admission to another person, thrust his fist into her face with some violence.

The Court is called upon to prevent the repetition of such occurrences—I have no hesitation in pronouncing for a separation.

PREROGATIVE COURT OF CANTERBURY.

BUDD v. SILVER.—p. 115.

Where there are several next of kin in equal degrees, administration is granted to the person who unites the majority of interests, unless there is some ground of objection, some reason for preferring another.

JUDGMENT.

Sir JOHN NICHOLL.

The deceased is Anne Prime, who has died leaving a testamentary

paper, not disputed, but in effect merely declaring an intestacy. There are nine cousins equally entitled in distribution—of these Budd and Silver contest the administration;—four of the next of kin join in Budd's prayer,—three in that of Silver, so that Budd has a majority of interests. Where there is no material objection on one hand, or reasons for preference on the other, the Court, in its discretion, puts the administration into the hands of the person with whom the majority of interests are desirous of entrusting the estate.

There is no objection to Budd's character, or his competency:—the only point argued is, that his competitor is a person of superior situation in life, being an alderman of the city of Winchester; whereas Budd is only a small shopkeeper in that city:—but, independently of the majority of interests being in Budd's favour, there is another reason why he should be preferred; for it seems a considerable question is likely to arise between the estate of the deceased and a son of Mr. Silver, respecting the validity of a gift. The parties interested in the property might entertain a great deal of jealousy that the claims of the estate might not be so strongly asserted by the father against his son; the more so, as he has produced affidavits to show that in his opinion it was a valid gift.

The Court grants to the person who has the majority of interests, unless there be some ground for setting him aside:—here there is no ground.

Administration granted to Budd.

ARCHES COURT OF CANTERBURY.

REEVES v. REEVES.—p. 117.

The re-examination of a witness refused.

AN application was made to the Court on the behalf of the party proceeded against, to permit Mr. Gallatly, a witness who had been examined in this cause, to be re-examined;—on the ground that he was so unwell during the time he was under examination, that his memory had failed him, and, consequently, that his conscience now impelled him to wish to be re-examined.

Lushington and *Herbert* in support of the application,

Cited *Griells v. Gansell*, 2 P. Wms. 646; *Sandford v. Paul*, 3 Brown's Chanc. Cas. p. 370; *Ingram v. Mitchell*, 3 Ves. Jun. 297; *Sawyer v. Bowyer*, 1 Brown's Chanc. Cases, 388.

Swabey and *Adams* contra.

The cases have no bearing on the point;—this is not an application to state that he has been misconceived; but, an application for permission to add to his evidence—he does not apply to rectify a mis-statement, but to supply a course of new facts.

Sir JOHN NICHOLL

Asked the Examiner whether, at the time of the examination, he observed any incompetency in the witness from illness, or any other cause.

The Examiner replied in the negative;—and stated that all the material points were accurately put to him.

JUDGMENT.

SIR JOHN NICHOLL.

The Court will not lay down that in no possible case, and under no possible circumstances, a witness may not be re-examined:—but, under any circumstances, the Court would accede to such a proposition with extreme jealousy.

The party here is applying for the re-examination of her own witness:—he has been very fully examined—and concludes his deposition in the strongest terms. It is confirmed by the Examiner that he was fully and carefully examined;—that the deposition was read over to him on the night on which it was taken;—that he attended again on the following day,—and the deposition was again read over to him.

It would go to the destruction of all evidence whatever, if a precedent of this kind were established.

POOL v. POOL.—p. 119.

In a libel in a cause for the restitution of conjugal rights, it is not necessary to plead specifically, that the parties were of 21 years of age; provided it is pleaded that the marriage was lawfully solemnized in consequence of a licence duly obtained.

PREROGATIVE COURT OF CANTERBURY.

READ v. PHILLIPS.—p. 122.

Testamentary effect given to an unexecuted paper.

JUDGMENT.

SIR JOHN NICHOLL.

Robert Phillips died a widower leaving four children, by three different wives:—the will propounded divides the property in certain proportions amongst them; it is all in the deceased's own hand-writing;—it was found after his death, in a place where he is proved to have deposited it, by a person to whom he had read it.

The only question is, whether he intended it for his will, or as a preparation for his will? The paper is complete as to disposition, but there is no executor; and it is neither subscribed nor executed; it becomes necessary therefore, to account for these circumstances. It is very fairly written;—great pains are taken in the composition of it, but there are no formal or concluding words at the end. His house-keeper says, he told her “that he had a will by him at his late wife's death, which he had burnt, and that he had written another, which he would one day show her;—that every person should have a will by them;—that he one day took from the leaves of a large book a paper, and said, ‘This is my will, or wish;’—she replied, that it was neither signed nor dated; upon which he answered, ‘that made no difference:’—he told her he had written it all himself;—that she said it ought to have been drawn up by

an attorney; to which he replied, it was all in his own hand-writing, and as good as if drawn up by fifty attornies.”

Under these circumstances I am quite satisfied that he intended it to operate as his will:—the presumption of law, which is very slight in this case against the paper, is repelled:—and therefore, I pronounce for the validity of it.

ARCHES COURT OF CANTERBURY.

ADDAMS v. KNEEBONE.—p. 124.

(An Appeal from the Consistory Court of Exeter.)

An allegation rejected in the Court below, admitted in the Court of Appeal.

REEVES v. REEVES.—p. 125.

Separation on proof of the adultery of the wife, not barred by the conduct of the husband.

JUDGMENT.

SIR JOHN NICHOLL.

This is a suit for separation, by reason of adultery, brought by the husband against the wife; the adultery is fully proved; that proof not being resisted, it is unnecessary to detail it. The wife defends herself, not on the ground of her own innocence, but by bringing an accusation against her husband, not of mere connivance, but that he has been the active instrument of his own dishonour. If proved, this is a sufficient defence; for he cannot come into a court of justice complaining of that as an injury, which he himself has caused to be done.

The history of the case, as given by the wife, is, that she, while living with her mother, was induced to marry Reeves clandestinely; both were minors. In 1810, Reeves's father discovered the marriage, compelled his son to quit his wife, and go to America; that the father afterwards, with the privity of the son, used means to seduce the wife to commit adultery, but that she returned to her mother, and lived in an irreproachable manner till this suit commenced.

This, if proved, would be a strong case of defence; for, though the privity of the son should not be proved, the Court would go far to presume it; if it should be shown that the son has left the father his agent, with a proxy, enabling him to proceed against his wife in the event of her committing adultery.

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25.
It is pleaded, that the parties became accidentally acquainted, and in a short time were clandestinely married; but, it appears by the evidence of the mother herself, that her daughter had, in the course of the preceding year, cohabited with this young man, and that it was not until five months after their first cohabitation that the banns were published,

in a parish in which neither of them resided:—under which publication the marriage was had; and they then went to her brother's. Mention is made of a bond given by Mr. Henderson, of 80*l.* per annum, to Mrs. Reeves; but this is wrapt up in mystery; therefore, as if there was something not creditable to the party to disclose, it has been suggested that the bond was from a person with whom she had a prior connexion; but that would not avail the husband: it is said that she resided with her husband some months before marriage, but neither will this affect the case:—antenuptial conduct cannot lay the foundation of a suit for divorce by reason of adultery; nor can it be brought forward as such against her;—but antenuptial irregularities do repel the sort of defence set up here that she was maliciously deserted by her husband, and her virtue undermined by artifice and stratagem.

Reeves was the son of a colourman in the Strand; he was an apprentice to his father, from whom, as has been stated, he kept his marriage secret: the father was informed of the connexion by an anonymous letter;—on taxing the son with it, he denied it; but the next day he wrote a letter to his father, deploring, as unfit, the connexion he had formed, stating that he knew his wife had been guilty of adultery; that he was unhappy, and was going to sea. He went shortly afterwards to Ireland, and was not heard of again till January, 1811; so that he was not compelled by his father to quit a virtuous wife; but he left her under the impression that she had been guilty of adultery. Reeves returns from Ireland, and is reconciled to his father;—he is informed that his wife conducted herself during his absence as a common prostitute;—he determines never more to live with her; and in June, 1811, he went to America, where he has continued ever since. These circumstances are deposed to by different witnesses:—no imputation can be raised from them of a malicious desertion;—he quits his wife under the impression that she was an adulteress;—the foundation of the defence laid in the plea wholly fails. The mother ventures to depose, as pleaded, to the virtuous conduct of her daughter;—other evidence impresses me with a contrary belief, and also with the idea that the mother must have been aware of it;—her brother and sister were both satisfied of her criminality; and, as she expresses it, gave her up. It is proved that she used to dress herself, and go out in the evening; and not return home till late the next morning. Full credit cannot be given to her mother, that she conducted herself with perfect propriety: the husband has left the country under the belief that his wife was an abandoned woman, but having no positive proof of her guilt;—it is no imputation against him that he wished his friend to watch her conduct. He is charged with having used means to induce her to commit adultery. Dunbar states that application was made to Reeves's father for a maintenance. That Ann Thompson, to whom the application was made, said, "Adultery must be committed,—she stands in her own light, there must be a divorce, the sooner the better." But Thompson, and Reeves the father, deny any such conversation, or any such intention:—Dunbar stands forth as her protector and paramour, he had criminal connexion with her; he is represented as a person preparing himself for the Bar, and an officer in the London militia;—his application to the father, (he not being her attorney) leads to the belief that a connexion between them had then commenced. I am of opinion that the plan to seduce her into adultery is by no means established; and that the friends of Mr. Reeves were only watching her for the purpose

of detecting her. But one act of condonation is stated subsequently, namely, the sending her tickets for the play; it is said this was only to prove her identity;—but he should have done nothing which would have led her into temptation: and if she had been that night led into adultery, and that had been the only act of adultery proved, I will not say what the consequences might have been, or how far the Court would have decided on a single act:—the Court will countenance no active step which leads to a criminal act;—here it led to no consequences, as the tickets were not accepted.

The father would have acted more judiciously, to have afforded her some support:—a husband is bound to support his wife, to aliment her during suit; but here he was a minor, and an apprentice, wholly dependent on his father. The wife had friends, a mother, brother, and sister, with whom she lived.

H. 260. R. 26. 2. The husband had no means of providing for her. The only question then is, whether the husband, not maliciously deserting his wife, but under the conviction of her adultery, leaving her without provision, not having the means of supporting her, is barred of his remedy. I do not find that any of the cases cited go this length. The Court is to administer the law, not to make it:—if the husband connives at, or acquiesces in adultery,—the law is clear, he loses his remedy, *volenti non fit injuria*;—still more so, if he actively promotes it. But to say that a husband quitting his wife because he is convinced of her adultery, and only waiting for full proof before he institutes proceedings, and not supporting her because he had no means of doing so, is guilty of connivance, would be to state a principle void of authority.

2. 2. The Court is reminded of the care of morality confided to it; and to be careful of laying it down, that any woman left without support by her husband may resort to prostitution for the means of livelihood;—I see not how the cause of morality will be supported by giving a woman encouragement in conduct of this description.—In this case I am not to strain principles. The woman, both before and after marriage, appears to have conducted herself with great profligacy. I have admitted her to go into her defence;—but after full consideration of the evidence, and the arguments by which her defence has been supported; I am of opinion that I am warranted in pronouncing a sentence of separation.

CONSISTORY COURT OF LONDON.

BUCKERIDGE, v. GOOCH, falsely calling herself BUCKERIDGE.
—p. 131.

In a cause of nullity of marriage promoted by the father of a minor, the evidence of the wife of that father is admissible.

3. 5. 3. s. c. WARING v. WARING.—p. 132. 2 *Aut. C. 105. 6.*

Charges of cruelty brought by a wife against her husband, not substantiated.

JUDGMENT.

SIR WILLIAM SCOTT.

This is a proceeding by Mrs. Waring against her husband for cruelty

and adultery.—The parties were married on the 5th of October 1800, and have five children—she left her husband in Jan. 1811, and soon after applied to this Court, charging cruelty and adultery against her husband.—The charge of adultery has not been pursued; there is a letter indeed introduced annexed to an interrogatory unknown to the other party on which some observations have been made; but it is impossible for the Court to give attention to it, or to the observations made upon it, as no opportunity has been offered to the other party of contradicting it. I shall follow the example of the adverse party, and dismiss that part of the charge from my observation; there only remains, therefore, the case of cruelty.

The definition of legal cruelty, is that which may endanger the life ^{201.} or health of the party—it generally proceeds from the wife, as the ^{4M.270} weaker person—but it may come from the man, and has so done in several cases; but, generally, the wife complains of what is dangerous to her—on the showing of which the Court releases her from cohabitation. ^{Bridgman. s. 490. 565.}

* In doing this the law presumes her not to have been the authoress of her sufferings; it is on the presumption that her own conduct has been proper, if not, the remedy is in her own power; she has only to change her conduct; otherwise, the wife would have nothing to do, but to misconduct herself, provoke the ill treatment, and then complain.—I do not mean that the law would not interfere, if this misconduct was visited by the husband with intemperate violence; there may be failings, if inordinately resented and visited with a harsh and more than due authority, upon which the Court would not decline to interfere. But if her conduct be totally incompatible with the duty of a wife, "if it be violent and outrageous," if it justly provoke the "indignation" of the husband and causes danger to his person—she must reform her own disposition and manners; she must remedy the evil by changing her own measures, and it is to be hoped that the evils will cease with the behaviour which produced them: and, if they do not, she may then complain to the Court, and solicit its interference with effect. ^{216.}

x On these principles this cause is to be examined.—It most certainly appears, that in this family grievous dissensions have existed, unbecoming the situation of the parties in life, and the duty of their relationship to each other—gross abuse,—violent language—personal struggles—disturbance of the neighbourhood; in short, such scenes as the Court has seldom witnessed in its experience of these cases. It does not necessarily follow that these dissensions are the husband's fault—they may be the fault of both—or pre-eminently of the complaining party herself.

Before I proceed to examine the principal parts of the case, some observations occur with respect to the witnesses.—The greater number ^{34335.} are produced by the complainant—they are servants, and where husband and wife disagree servants are witnesses to be heard with caution—they have their prejudices—the females generally take the part of their mistress—some are dismissed by one, some by the other; they speak according to their supposed injuries. "Three are cookmaids, who, from their situation, can know but little;" they come in where the parties are in contention, but must be ignorant how the contention arose.—Two are housemaids: "the same objection applies to them; they come in when open hostilities have broken out, but do not see the origin of them." The footman or butler, is also produced, who, perhaps, had more access to them; but his account shows that his opportunities of observation were

very imperfect.—A surgeon likewise, Mr. Cooper, has been examined, who appears to have had some differences with the husband, which may have coloured his evidence—but his knowledge, from his own observation, is of a very superficial nature.—In one particular illness he thought Mr. Waring's attention to his wife was not such as it ought to have been: this is matter of opinion—this may depend on the different degree of warmth of feeling in different men, and cannot be made a charge of legal cruelty.

6. Mr. Utterson, a gentleman at the bar, speaks to one fact, from which he infers harsh conduct, of which he can know little: she came in a state of distress; but he knows nothing of the commencement of the quarrel, and so judges only from her appearance; if the husband had come in in equal disorder he might have excited equal sympathy;—frequent noises are heard; appeals are made by the lady from the windows, which show great disorder in the house.—Twelve of the witnesses are subject to this objection that they never saw the origin of the quarrels. Cooke and others saw the quarrels, but did not see the beginning of them—what appears offensive and harsh might be justified or palliated by its commencement; that which would be violent, if aggressive, might be justified if defensive.—If the wife was the prior *lædens*,—if she gave the first blow, though it may have been unmanly to return it, the law will allow for the infirmities of human nature, and make allowances for conduct provoked by "gross and scandalous indignities."—The representations of such witnesses are entitled to little credit; but I must observe that several of them throw the blame upon the party complainant.

216. Mr. Henry Waring is the witness whose evidence, I think, entitled to the greatest credit—he is the nephew of one of the parties; but he has been examined on both sides, and speaks with moderate allowance for the faults of both parties. He saw them daily; in their quarrels he says the conduct of the wife was provoking, and soon became violent.

Chapman, who was employed in waiting on the children, as a nursery maid, says, "She frequently put herself in a violent passion; often said provoking things to him, which, as it were, made him quarrel with her."

Elizabeth Wickens "considered her as very provoking and sullen; she frequently locked herself up. One day when she did not choose to go down to dinner, she sent a message by one of her own children, to her husband, that if he did not send her up some dinner, she hoped the bones would stick in his throat, and choak him.

Lucy Wickens says "she frequently dined in a different room from her husband—witness saw them frequently together; that her conduct was frequently very provoking to her husband: several times she locked him up in his rooms, and refused to let him out, notwithstanding the messages he sent to her; once he was obliged to get out at the window."

Susan Wickens "thought her conduct very irritating; speaks to her locking up her husband, and that she would sometimes order no dinner to be prepared for him."

These are her own witnesses, who depose to her conduct, which is highly reprehensible, which must be expected to draw down severe treatment on her; in which she would be the authoress of her own wrong, and not entitled to relief.

I will now dismiss some charges, of which there is no evidence—the giving her an emetic to procure a miscarriage; of this there is no evidence whatever, but some declaration, made by herself, to Mr. Cooper the surgeon, and the servants; and seeing the nature of the declarations, in which she has indulged herself, respecting other acts, I do not think, in this instance, she is entitled to much credit. I have looked into the husband's answers, he denies the charge upon oath—he may have offered her medicines, he says, but it was for no such purpose—her sister has not been examined on this article; which is singular, as she appears to have been much in her confidence.

Another charge alleged is, that she had no supplies of money while her husband was absent in Ireland: this is not only disproved, but the fact turns out to be directly the reverse; she was regularly furnished with money from his counting-house.

Another accusation is, that she was compelled to come down stairs to dinner, when she had just had a miscarriage—that she came down to dinner, when she was very infirm, is true—nothing further is proved, but her own complaint; to which, considering the colour of her operations, I do not give credit.

Another charge is, that her husband for some years forbade her intercourse with her own family: it was not without hesitation that the Court admitted the pleading this fact, for, though it may be a harsh exercise of the husband's authority, yet he may be justified in such a prohibition: though a woman may be amiable, her connexions may not be so; and there may be many reasons to justify a husband in denying such an intercourse—though it may be harsh, it would be going too far for the Court to interfere. But it appears that some coolness took place between her husband and her father, on account of some pecuniary matters, in which the former thought, whether justly or not is immaterial, that he was ill-treated by the father—that he had provided articles for another person, on her father's recommendation, for which he thought him responsible, but he thought he was not. The husband complains that she threw the note from her father, respecting this transaction, into the fire—she admits, in her own plea, such facts as might fairly have given the husband ground for such a surmise.

The substantial charges of ill-treatment are three, they are admitted to be so by the counsel; but, if they are not *proved*, in point of severity, so as to carry legal consequences with them, the suit is at an end: it is necessary, therefore, to examine these facts.

On the 6th of April, 1808, the libel pleads that Mr. Waring, without any provocation, put himself in a passion, swore, attempted to drag her, &c. and beat her head against a marble chimney piece; that he broke her comb, which he forced into her head—she fell; he dragged her; the servants interfered on hearing her screams, and the husband then desisted. Several witnesses speak to this; but these servants come in after the heat of the battle, and know little or nothing of the circumstances that led to it; it turns out that Mr. and Mrs. Waring were invited to spend the afternoon with Mrs. Rule, and that there was some altercation about a coach. Mrs. Waring's sister does not mention the preliminary circumstances of the quarrel, in her examination in chief, but when pushed by interrogatories, she says, that the quarrel happened just as they were going out; that, in consequence of it he went alone, and she, unwell and agitated by the altercation, staid at

home. On the same interrogatories she says they were both going out, but the husband went alone—the cause was, the wife sent her to ask him if he would have a coach—he answered in the negative—she sent again—he again answered in the negative—she, ten minutes after, sent a message, by one of the children, to say, she *would have one* got: from the lateness of the hour and the uncertainty of getting it, she determined not to go;—he was angry, and went alone, leaving them to follow him—afterwards rain came on. I see no reason why the parties should be so violently dissatisfied with each other. A message was sent from Mrs. Rule, to desire her to come, or say whether she was coming or not—the servant was called in;—Mrs. Waring informed Mrs. Rule and her party, by this servant, *that Mr. Waring himself could tell the reason why she did not come*; and, after delivering this reply, the messenger was sent back. I cannot but think it was a rude and improper message, tending to expose the husband to the ridicule or censure of the company with whom he was—she could have gone—and I think the message was sent evidently with a view to draw that consequence upon him. Take it any how, her conduct was irritating; and it is not surprising that it should bring him home a provoked husband. What passed at first appears only from the sister; and considering how much she had made herself a party, that she had not dissuaded the wife from the behaviour and message before, I think her account of what followed is imperfect, and not perfectly credible; she says that, *without saying a word*, Mr. Waring passed her, jerked his wife off her chair across the hearth, by which she fell and struck her head; she screamed, and the servants came in—Wells says he found her on the ground, crying, “Oh my head;” he said, “Yes, with a violent oath, and it’s *oh my head too*;”—it appears then that they were both complaining of mutual violence;—he calls it a battle, another scuffle—it is extraordinary that the next day they dined together; and, Wells says, they appeared to be reconciled; if it happened as stated, I think she would probably have put herself for some time under the protection of friends; I think originally there was a provocation in not going, and a grosser one in sending the message;—a message passed after the conflict on his return, in which both complained—they dined amicably together the next day; and a formal reconciliation took place, through Mr. Abernethy, by the recommendation of her father.

Her husband went to Ireland—but Abernethy says he gave her a letter and told her her husband was coming home; she burst into a passion of tears, continued hysterical all day, *wished he might never return, but be drowned on his passage*.

Connect this with the message sent by one of the children, and I ask whether every thing outrageous is not to be expected from a person who so gave herself up to the expression of such an ungovernable passion.

Every thing ungracious appears to have passed on both sides. No open quarrel is brought forward till they were at Sandgate, in 1809. Henry Waring’s account (which, as I observed before, is the most credible) of the mode of living then, is not favourable to her. The servants would tell him *as she had ordered no dinner for him none was prepared*;—at times she was violent and outrageous, particularly about the carriage.

Elizabeth Wickens speaks to the same effect.

Looking at this system of life I think the wife could not more effectually try her husband's temper; contradicted in every thing, he appears to have borne it in a way rather inconsistent with that irritability of temper which is attributed to him—it makes evident what Henry Waring says; viz. *she frequently told him, that she would tease her husband into a separate maintenance, and would have 600*l.* per annum.* Mrs. English says, 800*l.*; they may have mentioned different sums, but I think the intention was to force a separate establishment by determined contradiction—such conduct could answer no other purpose.

Another fact complained of occurred on the 10th of October; Henry Waring says she asked him to go and see the fireworks:—the husband said he wanted him—she said if he would not let him go, he should not go himself—she locked the door, he opened it, she laughed insultingly, and he gave her a slap on the face; the witness thinks it did not hurt her, but it must have made her face smart—she attacked him, scratched him, pulled off his wig, took hold of the "poker," and said *she would settle him*—it was not an *incruenta victoria*, but she carried off the "wig," the *opima spolia*, which were pinned up in the window-curtains, and were not recaptured till the next day. It is scarcely possible to speak of such scenes with gravity, if they did not seriously affect the peace of the family. The lady seems to have taken the law into her own hands, and employed those hands most energetically on this occasion.

The husband, not unnaturally, returned to town in anger—a reconciliation between them was attempted by their friends—it might have been hoped that a sense of duty might have returned—something of that kind appears in a letter of hers which has been exhibited, acknowledging misconduct—he required that she should retract her dreadful expressions, what they were is not mentioned; however, she does retract them; and, thereby, admitted, undoubtedly, that such had been used—it has been answered that this was wrung from her, and it certainly appears not to have been a sincere and serious disavowal—her conduct was quite the reverse of what should have followed it, if sincere—her very penance was little short of renewed misconduct.

The last act was that of the 22d of January, 1811: this led to their final separation.

Henry Waring says, that the husband asked him to go to the theatre—she desired him to stay, and take her the next day—he said he would go then too—she said he was going to a mistress. She went out, and locked the area door and the house door. Suppose her suspicions were true, was this the proper way to regain her husband's affections? to turn his castle into a jail, and to become his jailer? it would probably lead to the opposite result—it would drive him to some more indulgent society. The committing an act of false imprisonment is an extraordinary way of breaking up an illicit connexion, and recovering alienated affections. He demanded the key, she refused it—he desired her to observe that he did not mean to use unnecessary violence—he attempted to take the key, she screamed—he said he would not hurt her, but *he would have the key, which he had a good right to have*: a great struggle took place, the servants desired her to give up the key—she answered *how can you plead for such a villain*—consider the effect of

such an expression to a husband locked up, and demanding possession of his own house, and the use of his own liberty—the servants remonstrate. She threw a little trunk at him, aimed a blow at him with a candlestick, got him down on the chair, bit his nose; and said, if he would not go out, she would give up the key; he got it, but it was a conditional surrender.

It is not necessary to pursue this history, which has degraded the attention of the Court for three days.

After this the consequences, which it is quite impossible, as I think, not to expect, followed. The husband found means, somehow or other, to effect the dismissal of his wife—and I cannot say, if he was reduced to the alternative, either to be deprived of his own liberty and locked up in his own house, or to part from his wife, that he was blameable if he took the latter course. In the conflicts between two such dispositions, there is no saying what might ensue. I do not enter into the mode which he took—all that followed was nothing more than the natural sequel of what went before.

On this state of the evidence, I am not entitled to say that either party is free from fault: to enter into personal scuffles with a woman, and a wife, is a hard extremity; but a man may defend his own life and liberty; and it is a hard task always to return blows with mere words—he may defend himself by force, if attacked by force.

But though I may not be able to exonerate the husband from blame, the wife's own conduct does not give her a title to complain. I am unwilling to describe it in the terms which properly belong to it: it might look too much like that "indignation," which every Court must naturally feel at having such scenes brought before it. I recommend to her the duty of self-examination: and to consider whether her own behaviour may not remove the evil, and consist better with her duty to her husband, her children, and herself. In the hope that this may be the case, I dismiss the complaint, and exonerate her husband from all further attendance in this Court.

ARCHES COURT OF CANTERBURY.

VERELST v. VERELST.—p. 145.

An appeal from the Consistory Court of London.

On the admission of an exceptive allegation. (a)

IN this case a suit for divorce, by reason of adultery, had been instituted by Mr. Verelst against his wife; and a libel had been given in by him. Mrs. Verelst gave in two successive allegations responsive to the charges brought against her in the libel, and recriminating upon her husband. Witnesses were examined on both sides, and publication was decreed.

(a) See what is said, 2 Hagg. Rep. 166. The decision of the Court of Arches was affirmed by the Delegates, 5 July 1814, *ibid.*

The present question arose upon the admission of an allegation excepting to the credit of four of Mr. Verelst's witnesses. A part of this plea had been rejected, and a part of it admitted in the Court below.

From that sentence Mrs. Verelst appealed.

Swabey and *Jenner* argued in support of the sentence of the Court below.

Arnold and *Herbert*, for Mrs. Verelst.

JUDGMENT.

SIR JOHN NICHOLL.

This suit originated in the Consistory Court of London; a libel was given in by the husband, and eight witnesses were examined upon it; an allegation was brought in by the wife, on which she examined twelve witnesses; and afterwards another allegation on which she examined four witnesses. Publication passed in the cause, and an exceptive allegation was then offered attacking the character of four of Mr. Verelst's witnesses. The Consistory Court rejected a considerable part of it, from which sentence the wife appeals; and this Court is to decide whether the judge of the Consistory Court has done right in rejecting it.

Before I examine the contents of the allegation, I will notice some of the principles laid down. It is admitted, on all hands, that exceptive allegations are received by the Court with great caution and jealousy: it is a principle of all Courts, whose proceedings are regulated by the civil law, that all facts shall be pleaded and proved before the depositions of the witnesses are seen, from the danger which might arise from the fabrication of evidence to meet the defects of the case. The Court is not the less cautious, when an allegation of this description is offered by the wife; for, though it is not the wish of the Court to narrow her defence, yet it must recollect that she has not the usual restraint of costs to operate as a check upon her conduct, as the expenses on both sides are defrayed by the husband. It has been suggested that the particulars of this case may justify a relaxation of this principle; but the Court must be cautious not to endanger the principle itself. It is said that the husband is charged with having obtained a verdict by collusion, and with tampering with the witnesses: but I have to remember that the wife has pleaded recrimination, and, in some articles, collusion, and that the husband had declared he knew of her adultery; therefore, though not inconsistent with innocence, yet the tendency of the charge was such as made the Court vigilant as to the subsequent defence, by charging the witnesses.

In the second allegation there was no attack on the general character of the witnesses; but it is pleaded that the verdict was obtained by the defendant having been persuaded not to bring forward her witnesses, and that the damages were agreed upon. If such is really the complexion of the cause, the husband would do well to consider what advantage would result to him from proceeding in this suit. It is competent to the wife to offer such a defence, and to show that the husband has brought unfounded charges; but this is not a case in which the Court can relax the principle on which it usually proceeds.

An exceptive allegation must not merely show slight variations in the testimony of witnesses; but it must show that the witnesses have wilfully sworn falsely; it must overturn their credit.

The first article has been ordered to be reformed, I suppose, by strik-

ing out the names of the witnesses against whom no article has been admitted.

The second article recites various parts of the depositions of the witness, William Preston, both in chief and on interrogatories; he had deposed to two acts of indecent familiarity. He was a gardener, employed in the absence of the footman; and sometimes, when the footman was not absent, to wait at table. The acts of indecent familiarity he states to have occurred at different periods: one on a day soon after breakfast; another, on a Sunday, about five weeks afterwards, when there was company in the house. In contradiction to this it is pleaded that the one footman left the family on the 24th of October, and a new one succeeded him on the 6th of December, and that there was no company in the house; and that Mr. Staples, with whom the wife is charged to have committed adultery, was only once there in that period. The witness, however, whose credit is impeached, is not, in his deposition, precise as to time; he was several times employed as footman, and might easily mistake the time when he saw the facts; it might possibly be when he was assisting the footman; he may have confounded the times; if these facts therefore, should be proved, they will not satisfy the conscience of the Court, that the witness has deposed knowingly and wilfully falsely; if he had been precise, and tied himself down to time, and it could be proved on the other hand, that Mr. Staples was only once there, his own evidence would weigh a little against the witness; but if he could prove an alibi, it ought to be distinctly set forth; I think the judge of the Consistory did right in rejecting this article.

The third article pleads that the witnesses gave a different account on the trial at common law from that to which they have now deposed. I do not see from the statement that it amounts to a contradiction; it is only that they express the same fact in different terms.

The fourth article pleads a direct and positive contradiction of Preston; and, as the party will have the benefit of this article which is admitted, it makes it still less necessary to have admitted the second and third—Let this article be reformed.

The fifth article is an attack on the witness, Humber, who has deposed, that “while they were at an hotel at Harrowgate, by means of the lamps in the passage, and a light from the window on the stairs, she plainly saw Mrs. Verelst go to Major Staples’s bed-room door in her dressing gown.” In answer to this they undertake to prove there was no lamp or light on the stairs—but really, considering the distance of time at which this transaction happened, I think it would not be possible to produce evidence so precise as to satisfy the Court that there was no light by which the witness could see the transaction she relates. I reject this article.

The sixth article has been admitted against Humber, and in that the party has the benefit of a stringent contradiction.

The seventh article states that Humber at different times, has given different reasons for not communicating to her master what she had seen. I think, however, the reasons stated might very well concur, and I confirm the rejection of this article.

The eighth article states, that Humber says, she watched the transaction from the best bed-chamber; and, it is pleaded, in contradiction, that she could not get into the best bed-room from her own bed-room,

without going through the kitchen; and that a person slept in the kitchen, which person will depose that, after she went to her bed-room, she did not return to the kitchen. The objection to the admission of this contradiction is, that these circumstances might have been pleaded in contradiction to the libel; and that, by admitting it, in this stage of the cause, I should break in upon a rule, than which none is more cautiously observed in this Court, viz. that a party shall not lie by and contradict in exception that which he might have contradicted before publication in plea. Without this rule the purity of evidence could not be preserved; and, on this ground, I reject the article.

The ninth article is admitted.

The objection to the tenth and eleventh articles is, that if the circumstances should be proved, they would not amount to a sufficient contradiction. I think the variations stated would not discredit the witness—he does not pretend to have taken down what was said, but the substance of what was said. She might easily mistake the 20th for the 21st of October—he states himself that if it was so in the paper, it was there by error, and the Court would put that construction upon it; it would not consider it as a wilful and corrupt misrepresentation. I see no inducement to falsify it.

The same observations apply to the thirteenth article.

I have now disposed of all the articles but the twelfth; which is given in contradiction to the evidence of Dorothy Sayer. She deposes, on her examination on the tenth article of the libel, “that the clock had just struck twelve, when, by means of the light which came through the glazed fan-light over Major Staples’s bed-room door, she plainly saw Mrs. Verelst come out of her own bed-room.” Whereas, on her examination in the Court of King’s Bench, on being asked, “*Did you leave the best bed-room door open so as to see,*” she answered, “*Yes.*” And, on being afterwards asked, “*How long had you been there before you saw any thing?*” she answered, “*the clock struck one, and, about five minutes afterwards, she stepped out of her own room, on the landing place.*” The witness gives no particular reason why she should fix one hour more than another—there is something of a variation certainly in this account, but it is not a material variation; if any reason had been assigned for it, the Court might have attributed corrupt motives to her; but, as it is, I must impute it to have arisen from mistake, from want of recollection, or from that confusion natural to a female on being examined in a public court of justice.

The evidence on which the Court is to rely, for the decision of the cause, is more to be collected from the substance of the depositions, than from any thing usually brought forward in an exceptive allegation. Circumstances material to the elucidation of the cause seldom come out on a plea of this description.

232-4. s.c.?

SMITH v. SMITH.—p. 152.

By Letters of Request from the Consistory Court of Bangor.

Alimony pending suit.

JUDGMENT.

SIR JOHN NICHOLL.

This suit is brought by the wife for cruelty and adultery. She now applies for alimony pending the suit; and certainly the Court will not allow the same as if such a charge was established; yet, I think, the nature of the suit is to be considered; the charge is made—the answers are given in;—as yet there is no allegation on the part of the husband; there is no ground to consider the suit as vexatious—no proceedings appear to have been had for the purpose of unnecessary delay. Therefore, the wife has a right to be maintained with some reference to her former comfortable state, yet with moderation.

Under the circumstances it is to be considered that a very great part, though certainly not the whole, of the fortune belonged to the wife—there is one child;—in the proceedings it appears that the wife is desirous to have that child; but the husband, charged with adultery, will retain it. The Court is not inclined to lessen the alimony on account of the maintenance of this child.

The Court must consider what is the fair and reasonable proportion. I do not exactly ascertain the income of either party from their answers. I take the husband's income to be about 1500*l.* per annum, and that which the wife has as a separate allowance to be about 300*l.* per annum. I think 200*l.*, in addition to the 300*l.* the wife already receives, will not be an improper allowance. I give it clear of the property tax, because that is deducted in the husband's estimate.

10 Pairs, 24.

WALKER v. WALKER.—p. 153.

A matrimonial suit dismissed on account of delay in the proceedings.

CONSISTORY COURT OF LONDON.

24. 5. 39. PARNELL, acting by his Committee, v. PARNELL.—p. 158. }

The committee of a lunatic may institute proceedings against the wife of a lunatic for adultery.

JUDGMENT.

SIR WILLIAM SCOTT.

This is a suit brought against the wife of a lunatic, for adultery, by his committee. The facts of adultery are charged in a number of articles—the admission of the libel is contested on the ground that the par-

ty proceeding is incompetent to bring the suit; and I must acknowledge that there has not occurred, to my observation and experience, any case in which a lunatic has appeared in such a case by his committee—it cannot, therefore, be determined by precedent, but must be decided by principle and by analogy.

On principle it resolves itself into two questions; first, Whether a lunatic is put out of the protection of the law of England in such a case; secondly, Whether there is any other mode of proceeding by which he can obtain redress.

On the first point there can be no doubt it would be a most monstrous proposition that the wife of every lunatic was absolved from all the obligations of marriage, was at full liberty to commit adultery, and to fill her husband's house with a spurious issue—the unfortunate husband cannot be left in such a state of aggravated misfortune. It is impossible that any system of law can have been so improvident as to have left such a class of persons without any remedy; their claim to protection is stronger even than that of other men: the law must apply that vigilance for them of which they themselves are incapable—it must afford them relief against the greatest of all injuries, affecting every consideration dearest to the hearts of men; for the sake of their families, also, lunatics must be protected by some mode or other.

The question then is, in what way relief is to be afforded them. I should answer in the same way that it is, when their other rights are disturbed, namely, by means of the committee—who, being specially appointed the guardian of the lunatic, represents to the Lord Chancellor—he has the care, in the language of the petition, of the person and property of the lunatic and of his family—he is to take care, not only of his personal rights, but of the general interests of his family. The lunatic must act by his guardian, by that person to whom the care of his fortune and property is confided.

The lunatic cannot directly institute a suit here; in momentous concerns connected with the Court of Chancery the committee usually applies to the Lord Chancellor for directions—to him the accounts of lunatics are submitted; but it is not necessary to resort to the Lord Chancellor for the purpose of exercising an authority to institute proceedings here. This Court, however, stands in no such relation to the lunatic; but it is bound to entertain a suit when the committee has determined to bring it—it has no discretion to refuse it.

On these grounds, and upon principle, the power of the committee must be upheld: it is exercised to protect the lunatic from the greatest possible injury—from the alienation of his family property—from making him responsible for the support of a wife, entitled to no maintenance.

Upon analogy to other cases, in what way do persons bring suits when labouring under infirmity of understanding, and imbecility from the immature period of their life? The suit then is the act of their guardian; he is to the minor what the committee is to the lunatic—he is appointed to have the *persona standi*.

In suits for nullity, the power of the committee has been admitted—and he has proceeded to the dissolution of marriage on account of the alleged incapacity of the party. Why not in this suit, which is not so momentous in its consequences? No injury is done the woman; if the

lunatic recovers possession of his senses, he has the power of condonation if he should think her still an object of compassion.

On these grounds I am without any doubt that this libel ought to be admitted.

2d 158.

ARCHES COURT OF CANTERBURY.

10 Paige, 36.

BEST v. Lady EMILY BEST.—p. 161.

Delay in instituting proceedings in a matrimonial cause to be accounted for.

PREROGATIVE COURT OF CANTERBURY.

DICKENSON v. DICKENSON.—p. 173.

Alterations in pencil on a regularly executed and attested will, admitted to probate.

WILLIAM DICKENSON, of Brocklesby, in Lincolnshire, Steward to Lord Yarborough, died on the 19th of July, 1813, possessed of considerable personal property—a will, dated January 8, 1795, was found in a book-case in the steward's office, at Lord Yarborough's, together with other private papers, and securities belonging to him—the will was regularly executed and attested by three witnesses; but several alterations and erasures had been made in it, by the deceased, in pencil—and there was on the enclosure the following indorsement, written also in pencil by the deceased.

To my wife one hundred and sixty pounds per annum, so long as she remains a widow; in case she marries again, this annuity ceases; and the money in the fund in my name, she to receive for her own use and benefit. The furniture, as mentioned within. The books to be given to R. Jowitt, of Leeds, Woolstapler, as desired by J. D. deceased.

The question before the Court was as to the testamentary effect of the alterations in pencil—they were propounded by the widow, and opposed by the brother who was one of the executors in the will.

At the period when the will was originally executed, the deceased had two sons living whom he had constituted his residuary legatees. The one had died on the 13th of September, 1804; the other on the 16th of August, 1811. It was pleaded, that by the initials "J. D." on the indorsement the deceased intended to designate Joseph Dickenson, the last of his sons who died.

Swabey, Jenner, and Gostling, in opposition to the allegation, referred to *Rymes v. Clarkson*, ante, 20.

Adams and Lushington contra.

JUDGMENT.

SIR JOHN NICHOLL.

The deceased made his will in January, 1795; it was regularly executed and attested by three witnesses—and he left his two sons his residuary legatees. The sons died before the testator—one in 1804—the

other in 1811—the will was found in the repositories of the deceased—in an envelope endorsed “William Dickenson’s will”—there are alterations in pencil in the body of the will—these alterations are all pleaded to be in the handwriting of the deceased—the exact time when they were made is not pleaded—but there is a strong probability that it was after the death of both the sons.

The question is whether probate is to be given of this paper as it was originally executed—or with the alteration:—the alteration being in pencil, increases the difficulty—it has been argued that, from this circumstance, they must be considered as merely deliberative; but there is no doubt that, in point of law, they must be considered as equally valid as if made in ink, provided the deceased intended them to take effect.

Primâ facie it may be supposed, under the circumstances, that the alteration was intended—and, as such, the paper at least ought to go to proof. I say *primâ facie*, because other extrinsic circumstances may hereafter be offered which may show that they were merely deliberative.

The alterations are made with considerable care—the sum is carried out into the opposite side—the difficulty is that the annuity, twice in the will, remains uncorrected—but it is observable that it is nowhere left uncorrected in the dispositive part, but merely in the recital.

The alteration also is highly probable—after the death of his children it was natural that he should increase the provision of his widow—the memorandum on the envelope is strongly confirmatory of the intention of the deceased—it might be made in order to render more clear the alterations in the will; and, also, to have effect, if a more formal will should not be drawn up.

If the deceased meant these alterations as a substratum for a new will, it does not seem probable that he would have written this indorsement on the envelope—again it is pleaded that the instrument was put away securely in his repositories with money, and other papers of concern—it was not at hand as if he was deliberating upon it—his death was not sudden, which confirms the idea that he did mean and intend this paper to operate in its present form—the probability of this is strong, if he lived on affectionate terms with his wife.

The circumstances taken together lead my mind strongly to the conclusion, that the deceased did intend this provision to be made for his wife—and I shall admit this allegation to proof.

The counsel should consider in what way probate may best be prayed. There is a strong impression on my mind, that by granting probate I shall carry into effect the intentions of the deceased. (a)

(a) No further opposition was offered in this case; but on the 20th of July, 1818, probate was taken of the will as propounded with the alterations in pencil.

HARRIS v. BEDFORD, formerly MANOOCH.—p. 177.

The presumption of law against a will having an attestation clause unwitnessed, repelled.

JUDGMENT.

Sir JOHN NICHOLL.

The facts of this case are beyond all controversy; for they are admitted in the answers. The will is in the handwriting of the deceased, concluding in the following terms:

“This being written throughout with my own hand, I am led to believe, from counsel’s opinion, that it will stand good in the eye of the law. I, therefore, revoking all former wills by me made, in witness whereof set my hand and seal the seventh day of January, one thousand eight hundred and nine.

Jan. 7, 1809.

Signed, sealed, and declared by the testator, F. F. Manooch, as his last will and testament in presence of us.

“F. F. MANOOCH.”

From the circumstance of there being no witnesses to the attestation clause, the Court is bound to presume that the deceased intended to do some further act—certainly the paper is imperfect—and the presumption against it must be repelled, either by its being shown that he intended it to operate in its present form, or that he was prevented from finishing it by the act of God. It differs from the last case, *Dickenson v. Dickenson*, ante 222,—for there was nothing in that from whence it could be inferred that the deceased intended to do something more—here, certainly, such an intention is to be presumed—but the presumption is slight, and may be repelled by slight circumstances. He was a military man, he lived much abroad, and was unacquainted with business.

The following circumstances show that the deceased intended this will to take effect—he left a natural son—brought up with great care and attention, and treated with great regard, till the time of his death—his wife and daughter were provided for by his marriage settlement—the object of this will was to divide his property into thirds between his wife, his daughter, and his natural son—his wishes on this head are strongly expressed in a letter which has been exhibited.

“Believe me, my dear Henry, when I assure you that my wife, little Anne, and yourself, are the most particular considerations I have on earth; and that whatever I may say or do, with regard to either, proceeds from the strongest affection.”

It is impossible that words can stronger express his intention than these do. He addressed this letter to his son about a fortnight before his death: it is admitted that the deceased was a reserved man in his affairs, except to his wife—and it is proved he, at *different times, and particularly within a short time of his death, declared to her that he had made his will, which he produced and read all over to her.* This is a sort of publication of it in its present form—the leaving his natural son unprovided for, was the thing farthest from his mind. I am convinced that he died with the full intention that this paper should operate as his will; and I pronounce for it as such.

NICHOLS and NICHOLS by their guardian v. NICHOLS.—p. 180.

A will, not written with a testamentary intention, set aside.

THOMAS NICHOLS of Southampton died on the 23d of January, 1813—his wife survived him: and he left a son and a daughter, by a former wife, who were minors. The children appeared by their guardians; and propounded the following paper as the last will of the deceased.

“I leave my property between my children; I hope they will be virtuous, and independent; that they will worship God, and not black coats.

“July 30, 1803.

“THOMAS NICHOLS.

“Witness Thomas King.”

The widow opposed the validity of this testamentary paper, and prayed the court to pronounce for an intestacy.

Barnaby and Herbert, in support of the will.

Adams and Lushington, contra.

JUDGMENT.

SIR JOHN NICHOLL.

This is a case under singular circumstances—the deceased died in January, 1813, leaving a widow, and two children by a former wife—the will is in these terms:

“I leave my property between my children; I hope they will be virtuous and independent; that they will worship God, and not black coats.

“July 30, 1803.

“THOMAS NICHOLS.

“Witness Thomas King.”

It is proved and admitted that this paper was written and signed by the deceased, and that he was of sound mind at the time; but Thomas King, a subscribed witness, gives the following account of the transaction:—

“The deponent is steward to Sir Charles Mill, whose solicitor the deceased was—he knew him intimately for twenty years—when they had any business to transact together, it was their custom to dine together at the house of each other. On the 30th of July, 1803, the deceased dined with the deponent—after dinner they adjourned, as usual, to the deponent’s book-room, where they drank their wine, which never exceeded a pint each, with, perhaps, a glass or two of white wine. The deponent and the deceased used to talk familiarly with him on many subjects—he was in the habit of ridiculing the tautology of lawyers, who, he said, employed a vast number of unnecessary words—that having finished their wine, the deponent took from a drawer a paper which he had drawn up as his will; and, showing it to the deceased, said something ridiculing lawyers spinning out papers, and asked him if it was not as good a will as if it had been spun out to a great length by a lawyer—the deceased replied, not only a valid will, but a devilish good one: and, asking for pen and ink, took a sheet of paper, and writing the paper propounded, threw it towards the deponent, saying, very

carelessly, there, that is as good a will as I shall probably ever make. These he recollects to have been the very words spoken—he did not request the deponent to take care of the paper, or say another word about it—or, from that time to his death, ever allude to it—and the deponent verily believed that he never recollected such a paper was in existence—a very short time afterwards the deceased shook hands with the deponent, and went away, leaving the paper on the table. When the deceased was gone, the deponent wrote his name as witness to the signature; (he was not requested by the deceased so to do) he then folded up the paper, wrote on the back ‘the will of Thomas Nichols, Esq. of Southampton, July 30, 1803;’ and put it into his iron safe, where it remained, with many other loose papers, till after the deceased’s death. The deponent does not believe that the deceased, when he wrote the paper, intended to make his will, or that such paper should ever operate as such; but he always considered, and does still think, that it was written without any other view than in imitation of the paper the deponent had so shown him—a copy of which he annexed to his deposition, and to show the deponent he could exceed him in brevity—and the deponent is confirmed in this opinion by the practice of the deceased on other occasions; the deponent being in the habit of drawing specimens of leases, and other instruments, wherein very few words were used, which he showed to the deceased; and he, upon such occasions, uniformly wrote others still shorter, by way of showing that he could exceed him in brevity. The deponent never considered the paper as the deceased’s will, but as the deceased’s specimen of a short will; and as such he signed his name as a witness to it, and endorsed it, and put it in his iron safe. He further saith, that his intimacy with the deceased continued till his death in January last—that, during his illness, he visited him about once a week for five weeks together—upon those occasions, not considering the aforesaid paper as intended as a will, and understanding from the deceased that he had made no will, he was very urgent with him to make a will—the deceased’s answer to such applications being, that he did not know but that the law would make a better will, or as good a will, for him as he could make—but the deponent and others having pressed him to make a will, the deceased did at length, shortly before his death, say, that when he got a little better he would, to satisfy his friends, make a will; but this he did not live to do—he grew worse daily—that the deponent never alluded to the paper writing, for he had himself forgotten that such a paper was in existence.”

The same witness, in answer to an interrogatory, says, “that a few days after the death of the deceased, Sarah Nichols, his widow, told the respondent she could find no will; and asked him, as he was the confidential friend of her husband, if he had left a will in his hands. He replied, No, he never left any will with me; but added that, if it would give her any satisfaction, he would search his papers, which she requested he would do, saying, that she concluded from the intimacy that subsisted between them, if her husband had left any will, with any one, it would be with the respondent. The respondent had then no thoughts of the paper in question; nor did the circumstances of the same having been written occur to him, till, on turning out the various papers that were in the safe, he found it there—that the respondent thought so lightly of it when he went to Sarah Nichols, and showed it her, that he said, This is all I have got, and you may put it into the fire. The

respondent does verily believe that the deceased departed this life without the least recollection of the paper being in existence—that the deceased and his wife lived on the best terms together, and the greatest love and affection subsisted between them.”

This is the account given by the only witness, whose name is subscribed to the paper; and if this evidence can be received, and is to be credited, this is not the will of the deceased, for it wants the great requisite, the *animus testandi*; it was not written with the mind and intention to make a will. A question has been made whether this evidence can be received. I am of opinion that it can and must be received;—it is the evidence of the attesting witness, who must be produced, and whose testimony is common to both parties. What credit may be due to it is another question. A witness attests a will for the purpose of giving authenticity to the *factum* of the instrument: the *animus testandi* is the very point into which the Court of Probate is to enquire—the mere act of witnessing or signing does not exclude, of necessity, the absence of the *animus testandi* any more than the mere act of cancellation excludes of necessity the absence of the *animus revocandi*. It may have been signed under duress, or under other circumstances when there was no intention to make a testamentary disposition.

The evidence is admissible, but is certainly to be received with great caution, the paper being dispositive; and the witness having signed it must be heard with jealousy to depose against the effect of his own act—it is true the attestation clause is not in the usual form; it is merely the word “witness:” but still that infers an attestation of the act of the deceased; and the witness must be carefully heard by the Court.

The evidence then being admissible, the next question is, Does the Court believe this account? The witness is in a respectable situation in life; wholly unimpeached in credit and character; the confidential friend of the deceased; and no possible inducement is suggested why he should declare upon oath a false account of the transaction—the account he gives, though whimsical, is neither unnatural, nor improbable; the internal evidence of the paper strongly corroborates it, as do also the extrinsic circumstances—he says the deceased wrote it in order to show in how few words a will might be written—there is something of levity in the expression “Worship God, and not black coats:” it is in imitation of one written by the witness; his is in these words:

I give and devise all my property, real and personal, to Mary my wife to be divided by her, as she shall think proper, between all my children, either in her life-time or by will (reserving enough for her own comforts.) I hope my children will obey their mother, love each other, and be pious and virtuous; that they worship God and not man, nor ever practise the trade of a butcher, nor ever accept of any place in the navy or army. But they will endeavour to plant and extend happiness, to raise cottages for industry and honesty, and make the desert smile with plenty and innocence; that they will despise only those who monopolize the earth for the gratification of their own luxury and pride; and that they will look up to none as their superior but those only who exceed them in good works; and never treat any of God's creatures with contempt but the proud and profligate; and never bend their knee but to their God. This is my will; and I do hereby appoint my wife sole executrix thereof. In witness, &c. &c.

Signed,

Thomas King.

Upon comparing the two instruments, I think the one a compressed imitation of the other—the admonitory part in the one occupies twenty lines; in the other the same idea is given in more concise words. It is an extremely strong circumstance that it makes no alteration in the disposition the law would have made of his property. For what purpose could he have intended this paper? In it there is no legacy, no executor, no guardian to his children—this is a strong confirmation that it was not written *animo testandi*, but for the purpose mentioned by Mr. King—subsequent circumstances still more confirm this; the deceased afterwards married—he lived on terms of affection with his wife, and he *said he had no will, that the law would make a good will for him*—so that it was his intention that his widow should possess, after his death, the provision which the law would give her—during none of these conversations does he make any allusion to the existence of this paper—his forgetting it, would not operate as a revocation; but it is a circumstance to show that he originally never intended it as a testamentary paper. There is little doubt that when he threw it across the table, he meant it should be put into the fire.

With all the possible caution that the Court can exercise where a witness is deposing against his own act, I am yet fully satisfied in my mind and conscience that the deceased never intended this as his will: I therefore pronounce against it; and decree administration to the widow, her husband having died intestate.

BARCLAY v. MARSHALL, formerly KEITH.—p. 188.

A creditor is entitled to a statement of the effects which have come into the possession of the executor.

ELEANOR BARCLAY, a creditrix of James Keith, deceased, took out a citation against Mary Keith, his executrix, to bring in the will, and accept or refuse probate of it, and to exhibit an inventory of the effects. Mary Keith brought in the will; accepted the probate; and, after some delay, exhibited an inventory. Eleanor Barclay gave in an allegation, pleading certain sums of money as received by the executrix, which were omitted in the inventory. Whereupon Mary Keith gave in a declaration instead of an inventory, in which she admitted one of the sums pleaded to have been omitted.

Jenner, for Eleanor Barclay, moved for the admission of the allegation.

Stoddart, contra.

The only object of this application is to falsify an inventory.

JUDGMENT.

SIR JOHN NICHOLL.

The object is not to falsify an inventory, but to obtain a full one. Why did not the party give in her answers to the allegation instead of a declaration? She is bound to answer; the very use of giving in an allegation in objection to an inventory is, to get a specific answer to a specific averment. Many persons will evade, under a general denial, that which they will be afraid to deny specifically.

I think the creditor is entitled to have a constat of the assets that have come to the executors' hands.

I shall admit this allegation.

BENNETT v. JACKSON—p. 190.

A nuncupative will not established for want of a sufficient rogatio testium.

MRS. SUSANNAH JACKSON, of the city of Bath, died a widow, on the 10th of May, 1813, leaving ten children: on the 29th of April, preceeding her death, being in her dwelling-house at Bath, and in her last sickness, she summoned several of her children, and the daughter of the person with whom she lodged, to her bedside, and declared herself to the following effect:

“Joseph Henry Bennett, your brother, is my heir, and all that I have is his. Tell him to pay all my debts; give my love to him, and tell him to take me home, and by no means to leave me here; tell him to be a father to you children. I know he will for my sake; I know the goodness of his heart; he will be a kind father to you.

“Edward, my wish is that you should follow the profession I have chosen for you; and let no one persuade you from it.

“With respect to you three girls, if George and Keller send for you, you must go; but never do any thing without consulting your brother Joseph, not even the smallest thing.”

These words were reduced into writing on the 13th of July following and attested by three of the persons present at the time they were uttered; and were now propounded by Joseph Henry Bennett, the eldest son, as a nuncupative will.

Decrees were taken out against the other children, to show cause why a probate of the aforesaid will nuncupative should not be granted to him as the sole executor named therein according to the tenor thereof. The process of the Court was served on all of them; but no appearance was given for either of them.

JUDGMENT.

Sir JOHN NICHOLL.

Probate is called for of a nuncupative will; minors are concerned.—In cases of this description, the statute enjoins several requisites; the principal one is the rogatio testium, the calling upon persons to bear witness to the act; my doubt is, whether there is sufficient evidence here to this point: the words of the statute 29 Car. 2. c. 3. s. 19, have always been strictly construed; it was so held in *Parsons v. Miller*.

In that case, Prerog. H. T. 1797, a paper was propounded as nuncupative; the credit of the witnesses was unshaken: but the Court thought the words addressed to the witnesses did not in effect desire them to bear witness. The deceased himself is required by the statute to bid the persons present bear witness.

In *Darnbrook and Sawyer v. Silverside*, Prerog. 1767, it approached very near a rogatio testium; but it was said by the counsel in that case, that Sir George Lee had rejected an allegation on similar grounds.

Now, in the present case, at the beginning of the transaction, there was clearly no rogatio testium: the statement is, “that the deceased having called Anne Jackson and Elizabeth Warren Jackson (a minor) her

daughters, to her bedside, and spoke to them of the disposition of her effects; and Edward Bennett Jackson, her son, being sent for, to be also present to hear his mother's declaration; and her said three children being all present, and at her bedside, she, the said Susannah Jackson, did, in the presence of us, whose names are subscribed (the three attesting witnesses) and of the said Elizabeth Warren Jackson, declare and direct, &c."

This is the statement; and neither in this nor in the words spoken is there any thing to show the animus testandi.

There is no declaration that the words were spoken with the intention of making a will at the time: which the statute particularly requires. The affidavit goes on to state that Susannah Jackson, "after making the declaration aforesaid, observed that it should be committed to writing; but afterwards said, that the deponent's hearing it would answer the same purpose; and, lastly, these deponents make oath and say, that the deponent, Ruth Sidewell, having afterwards left the bedroom of the said deceased, for a short space of time, unperceived by her; the deceased, who had noticed the return of the said Ruth Sidewell, said, 'Mrs. Sidewell, why did you leave the room; I wished you to witness all I had to say to my children.'"

I have considerable difficulties in holding this to be a sufficient compliance with the statute. It does not appear that the words were spoken animo testandi; there is no rogatio testium at the beginning, no declaration that the words were spoken with the intent of making a will at the time. The words of the statute are very strong, and must be held strictly.

Allegation rejected.

PARSONS v. MILLER.—p. 194.

Dr. Laurence.

The statute of frauds meant to place extraordinary checks on such wills, as being more particularly liable to fraud; they are to be construed strictly. The opportunity of detecting fraud would not so readily occur; they might be set up by a conspiracy of the persons present; in this instance, also, there is no rogatio testium.

Dr. Swabey, on the same side.

Sir William Scott, in support of the will.

We admit the rogatio testium to be necessary; but no particular words are required by the statute: it is sufficient if the Court is satisfied that the deceased meant to do a testamentary act, and wished the persons to attest it. The statute does not require them all to attest; it says "*or some of them*;" if he signified it to one, it is sufficient; it is a rational compliance with the statute.

Dr. Nicholl on the same side.

JUDGMENT.

SIR WILLIAM WYNNE.

The paper before the Court is propounded as the nuncupative will of John Saunders; it has been reduced into writing in the usual manner, purporting that it is by the desire of the deceased; and it is signed by three witnesses.

Objection has been taken to the credit of the witnesses; but it is of no weight; it is said two of them are relations; this is no objection in this Court, as it would not be in another. The history is perfectly credible; no person can doubt that the fact passed as stated.

The only question is, whether what passed is sufficient to satisfy the statute 29 Car. II. c. 1. s. 9.

It is in evidence that he spoke these words: "50*l.* for Anne Bedford that was; 50*l.* for ———; 50*l.* for ———; and two bonds I give to ——— and all interest."—He spoke these words, 1st, before one witness, then before two, then again before three. The witnesses speak fully to capacity. But the question is, whether these words were spoken with the expression of the testator requiring them to bear witness. I cannot find any such expression. The conversation began between the deceased and Mary Parsons—he did not begin to converse about the will; she began by enquiring if he had settled his affairs—he replied he had not made a will; she asked if she should send for Mr. Mitchell to make one—he said he was too ill to make a will—she asked if there was any thing he would have done, and she would see it done—he began at once, repeating the words pleaded, but without desiring her to bear witness. She then, thinking it necessary to have another witness, said, "she would call up Mary Carter that she might hear and be a witness." The deceased answered, "*Do.*" This is the only word of the deceased's expressing any wish on the subject. She called Mary Carter, and said, Now repeat before Mary Carter, and she will be a witness—this is a *rogatio testium*, but not by the testator—I cannot hold here *qui facit per alium facit per se*. The testator repeated 50*l.* for Anne Bedford, &c.

The witness says, that having heard that three witnesses were necessary for a will; of her own accord, she called Samuel Clarke; and, when he came, Parsons said, Do you take notice what Mary Saunders is going to say; and then desired her to repeat it, which she did. She does not prove that he did, but she proves that he did not express any words which are made absolutely necessary by the statute—I do not say there was any ill intent on the part of the witness; for the deceased had said he was not capable of making a will on being told by Mrs. Parsons she would see it done—she repeats the four legacies, &c. twice over—it is a rational compliance with the statute to say this is not within it. The statute is to be taken strictly—it meant that persons should not get about the deceased, and ask him questions; but that it should originate from himself—I think this so clearly necessary that if no *rogatio testium* should be pleaded in an allegation, it must be rejected.

In *Darnbrook and Sawyer v. Silversides* before Sir George Hay in 1767, there was a decree to show cause why an administration should not be revoked and granted with a nuncupative will annexed. It was pleaded that the deceased was ill in bed of the sickness of which he died the next day at his own house; and that, with the intent to make a nuncupative will, he did utter words in the presence of three witnesses. Shean asked "if he had made his will;" he said, "No."—Shean said, "a verbal will would be sufficient, as there were a sufficient number of witnesses present;" he said "he knew it would," and then he uttered the words pleaded. The Court said it would be very unwilling to reject any plea if the parties could possibly obtain the effect of their prayer; but that the Court was tied down by the statute, and it

did not appear that the deceased addressed himself in any such manner as was required, before the words were spoken; and the allegation was rejected. It was said by counsel, in the hearing of that cause, that Sir George Lee had, in 1755, rejected an allegation on the same ground.

Here the fact is pleaded, but not proved. I think I am bound, especially under that case, to say that this will is not proved to be made as the statute requires; and I must pronounce against it.

ARCHES COURT OF CANTERBURY.

The office of the Judge promoted by

CARR v. MARSH.—p. 198.

A bishop cannot consecrate a chapel, or authorize a person to preach in it without the consent of the incumbent of the parish. The office of the judge allowed to be promoted, not upon the merits of a case, but from the nature of the suit.

220. 5c. ?

SMITH v. SMITH.—p. 207.

A separation decreed at the suit of a wife, for the cruelty and adultery of her husband.

JUDGMENT.

Sir JOHN NICHOLL.

This is a suit for cruelty and adultery brought by the wife. The libel was opposed, but admitted. Eighteen witnesses have been examined upon it—there is no allegation on the part of the husband. It will be sufficient to state the facts proved, without detailing the evidence.

The parties were married in 1794;—she was a widow with a large fortune; he a minor and an officer in the life guards—the disparity in their years did not promise happiness. In 1795, he began to treat her with indifference; and proceeded to acts of violence, though not proved to be for the purpose of inducing her to give up her property. In December, 1795, she went to church in her own carriage, and staid to receive the sacrament. While she was there he ordered the horses to be sent to Tattersall's to be sold, and told the servants not to obey her—she insisted on keeping the horses which were her separate property; and the sale was prevented. On his return home there was a quarrel; he locked her up in his dressing-room, and went out; she was released by the servants. On his coming home, and finding her at supper below with his sister, in a passion he seized her by the wrists in order to force her up stairs: the servants were deterred by his threats from interfering. She opened the door and called the watch: two neighbours came in; she escaped to Mr. Dashwood's at next door; and went with a Mrs. Purchase, who was there, to her house.

A separation took place by consent in August, 1796—she agreed to allow her husband 200*l.* per annum, in addition to what he had of his own. The separation continued till 1800; in that time he formed an

adulterous intercourse with a Mrs. Trefusis. In 1800, through the interference probably of his friends, who resided much with Mrs. Smith—a reconciliation took place. They went to Pendyffryn, where she was building a house—she was prevailed upon to execute a deed by which her property was settled on him and his issue—she came to town in 1807, and lay in of a daughter—he went to Pendyffryn—there were two maid-servants there—he slept in his dressing-room, and lived in it, and had one of the maid-servants to make his bed—he had, therefore, full opportunity to solicit their chastity—which he did not pass by—the first he attempted seems to have been attached to another person and resisted him: with the other he formed a criminal connexion: this is proved on her own confession.

When his wife returned to Pendyffryn; when all the affections of the father and the husband should have been excited—on pretence of her nursing her child, but for the purpose of keeping up his connexion with the housemaid, he slept apart from his wife. Soon after there was an act of violence, which, from defect of memory in Major Hamilton (who deposes to it) is not clearly set forth—but she complained, in the presence of Major Hamilton, to her husband. The next day he took the child with such violence from her as to endanger both one and the other; and he said if she resisted, she should be confined as a mad woman. Major Hamilton states his memory to be defective; but, from all he remembers of her character, it was mild and gentle. Soon after this she appears to have discovered his intimacy with Hannah Dod: she put a letter on his table remonstrating—and stating that she must leave the house if Hannah Dod was not sent away. This letter producing no effect she applied to Mr. Lloyd to remonstrate with her husband, which he did, and together with Major Hamilton, endeavoured to impress upon him strongly the impropriety of his conduct, but he persisted; they repeated this to him, and expressed their hopes that he would relent—he did send Hannah Dod away; but only to abandon his wife and child, and to live in adultery with Hannah Dod, which he did at West End. It is fully proved that Mrs. Smith continued to reside at Pendyffryn, till she had no longer means so to do. She went to her brother, and occasionally to Leamington. Smith returned to Pendyffryn, followed by Hannah Dod, who lived with him as housekeeper. He thought proper, about two years afterwards, to claim the rights of a father; he went to Leamington, and insisted peremptorily on taking the child—Mrs. Smith, who is described by the witnesses as a most tender mother, said, “If he takes the child, he must be troubled with me also.” This he refused. She said he might as well take her life as her child from her: after some hours, he was prevailed upon to allow his wife to return to Pendyffryn—refusing her offer to come and live in the neighbourhood in some place where he could see the child continually.

In this conduct it is clear that she was solely actuated by maternal feeling for the child—not by any consideration of what had passed—she slept in a separate room with her child and a maid servant. What was the conduct of the husband? He sleeps on a separate floor, and Hannah Dod had ostensibly a separate room: but there can be no doubt but that she frequently partook of his bed. He treated his wife with the most marked disrespect and contempt; he took his meals with her, but seldom spoke to her—she had no part in the management of the house or the family; that was vested in Hannah Dod—Hannah Dod was

the constant companion of his walks, and the child was with them—Mrs. Smith endures all this insult and indignity for the child's sake—at last he determined to rob her of this her only comfort. The child was a little unwell—some trifling medicines were given—she got quite well again—she went out to dine at Conway—he had the child's bed taken down, and put up in his room—on her return she asked him if he meant to take the care of the child from her—he said he did, for she had treated her ill—this was done with the sole view, as the witnesses say, of distressing his wife; her judicious care of the child is proved: he persists in his determination to take care of the child; to take it from a mother to sleep in a bed-room which was no doubt the scene of his constant adultery. When she left her husband, on this remonstrance, he called her back to shut the door. This trivial circumstance, in such a moment of distress, is such an act of unfeeling insult, as proves, to my mind, the tyranny of his disposition, and shows her passive obedience and entire submission to his will.

Deprived of the only inducement she had to reside in this scene of insult, of disturbance, and of profligacy—she quits the house, and goes to that of a clergyman in the neighbourhood—she wished to leave her own maid to take care of the child; even this he refuses—she returns to pack up her clothes—he makes this a pretext for refusing to allow her to see her child, not only then, but ever after. Ever since this, the parties have been living in a state of separation; the husband in adultery with Hannah Dod, and in possession of his daughter; depriving the mother (to whose moral character no blame is imputed) of the only comfort and satisfaction of her life.

This is the history of the facts—the conclusion is short—adultery is proved, and that alone entitles the wife to a separation. Cruelty, in my judgment, is also proved. Here is violence preceded by deliberate insult and injury. The sending away her horses, and putting them up to sale, while she was at church;—the forcibly carrying her and confining her to her room; afterwards attempting forcibly to carry her back to *her place of confinement*—the forming an adulterous connexion with her maid—the keeping that servant in the house, notwithstanding the remonstrances of his wife and her friends—the deposing his wife from the management of his family, and vesting it in this prostitute—such circumstances have always been held by the Court, not merely as acts of adultery, but as connected with cruelty. In addition to this, there is his conduct respecting the child—notwithstanding the pretext of paternal right, the exercise of which, courts of justice will not be disposed to scan too nicely; yet here it was done, as has been shown, merely to distress his wife—this is marital tyranny—it is as clear an act of deliberate and unmanly cruelty as can be committed.

Upon the whole, I have no hesitation in holding the libel proved as to cruelty as well as adultery—and I decree a separation to the writ *a mensa et toro*.

PREROGATIVE COURT OF CANTERBURY.

HUNTINGTON v. HUNTINGTON and others.—p. 213.

Instructions established as a will.

THE Rev. William Huntington, of Pentonville, being taken ill early

in the month of June, 1813, went to Tunbridge Wells for the purpose of obtaining the professional assistance of Mr. Stone, his solicitor, who was resident there, in the making and executing his will. For the first few days after his arrival at Tunbridge Wells, he was prevented by the visits of his friends from engaging in any business—but on the 27th June he sent for Mr. Stone, and told him that he had the whole of *his will in his own mind, and that Mr. Stone should write it all down from his own mouth*; and he particularly desired it might be written on one sheet of paper, as he did not wish it to be long; and he appointed him to come to him on the next day:—On the next morning Mr. Stone came, and the deceased dictated to him No. 1. On the 29th Mr. Stone was prevented by other business from attending Mr. Huntington in the morning; and in the evening the latter (though he had sent for Mr. Stone) was too much fatigued by an alarm he had experienced respecting the journey of a part of his family, to dictate to him. On the 30th, however, he dictated the remainder of his instructions contained in papers No. 2. and No. 3.—and approved of them when read over to him—and directed Mr. Stone to have the whole fairly copied and to bring early the next morning a fair copy for him to sign and execute. In the afternoon, a doubt having suggested itself to his mind respecting one part of the instructions, he again sent for Mr. Stone, and explained it to him; afterwards the deceased expressly informed several persons in his family that he had been making his will, and settling his affairs, and had, that morning, finished it. On the next morning (July 30) he was suddenly attacked by a fit, and rendered incapable, and so continued till the evening, when he died.

A caveat was entered by the seven children of Mr. Huntington (*viz.* Gad Huntington, Ruth Blake, Naomi Burrell, Lois Clark, Ebenezer, Benjamin, and William Huntington)—this caveat was warned on the part of Lady Sanderson, the widow of the deceased, who propounded the instructions dictated to Mr. Stone, as containing together the last will and testament of her husband. The instructions were as follows:

“In the name of God, Amen.—I, William Huntington, being now in my right mind and memory, and not knowing the day of my death, do make and declare this my last will and testament, in manner and form following: *imprimis*, that is to say, I leave my body and soul in the hand of my Saviour in whom I have been enabled to believe, and in whom I am saved. All my gardening utensils, all my coppers and brewing vessels, all the casks of my cellar, my carriages, my horses, and all the furniture and effects of my house, this I leave and bequeath to my beloved wife, to be enjoyed by her as long as she shall live, so that no room shall be spoiled of its furniture, nor even my study, nor my book-cases shall be dismantled. The house which I have built on the leasehold ground in Gray’s Inn lane (the rent of which is seventy pounds per annum) this, and the rents thereof, I give to my said beloved wife, to be enjoyed by her, so long as she shall live. Moreover, the three ground rents of the houses in Gray’s Inn lane, at nine pounds per annum each, for the erection of which I have granted building leases; these rents I give to my beloved wife, to be enjoyed by her as long as she shall live. The chapel also which I have erected on the said leasehold ground I give my said wife, for her life, subject to her paying to Mr. Chamberlain, or whoever it be

that succeeds me in the ministry, the sum of two hundred pounds per annum out of the profits thereof. The little piece of ground, which I purchased, Hayseldon's Wood, in Cranbrook, and erected a double cottage thereon, for the benefit of three poor aged sisters of mine, and which cost me better than five hundred pounds, I give and devise to my beloved wife, and her heirs, to do as she pleases with after my said three sisters shall be dead; and, exclusive of the five thousand pounds my wife's father settled upon her, and exclusive of the fifty pounds a year annuity likewise, which he settled upon her; exclusive of these two sums, I have received with my said wife, eight thousand six hundred pounds; three thousand six hundred pounds I received of Mr. Dyke; and five thousand pounds I received from the Court of Chancery, being the sum her first husband, Sir James Sanderson, left her upon her second marriage; this sum of eight thousand six hundred pounds I have not diminished ought, but rather increased: there is seven thousand six hundred pounds five per cent., navy stock; and there is one thousand one hundred pounds lent, the vouchers of which my said wife has got by her; and, as it is in good hands, I would wish her not to call it in unless necessitated so to do: there are a few more hundred pounds which my said wife knows of, and all these several sums of money, and my power over them, and all that is due to me or may become due to me, at my death, whatsoever the amount, or wheresoever found, I give and bequeath the whole thereof unto my said wife absolutely. At the death of my invaluable wife, I will that all my garden tools, my iron roll, and watering engine, all my coppers and brewing vessels, all the beer and wine casks of my cellar, my carriages and horses, and all the furniture of my house, my library and books, and every thing else appertaining to me, in my said house (except what is, strictly speaking, Miss Sanderson's own) I will that it shall be all sold at my wife's decease; and the money arising therefrom shall be distributed in the following order (that is to say) my son Ebenezer has run through between two and three thousand pounds, in which he has done no good; being very desirous to live, but not to work, he has been a heavy burthen to me in my old age; he has abilities sufficient, not only to run through his own share, but the share of all the rest; therefore, I give him ten pounds, and no more. My son Benjamin has run through more than five hundred pounds; therefore, I give him two hundred pounds which I desire may be paid into the hands of Mr. Edward Aldridge, for his use. My son Gad has run through three hundred pounds; and, therefore, I give him three hundred pounds more: the residue of the money arising from such sale I give to be equally divided between my daughter Naomi Burrell, my daughter Lois Clark, and my granddaughter Naomi Wayte, share and share alike. The chapel in Gray's Inn lane aforesaid, after my said wife's decease, and her heirs jointly, which they shall have no power to mortgage, nor sell, nor disturb the congregation therein; the managers of the chapel shall pay to my son William, and son-in-law James Blake, and their heirs, two hundred pounds per annum, clear of all deductions, except the property tax, as a rent for the same; also my said house which I built in Gray's Inn lane (after my said wife's decease) I give to my daughter Naomi Burrell for her life, and, at her death, to devolve upon her said daughter, Naomi Wayte, and her heirs. The said three ground rents I give

to my daughter Lois Clark, to her and her heirs, after the decease of my said wife. And my copyright of my own writings I give and bequeath, jointly, to Mr. Thomas Bensley, and my son-in-law William Clark. This I do, because my son Ebenezer is determined to live without work; and, indeed, I have no doubt but he would sell them into the hands of any man, whereby spurious works in my name might be attached to them, and the world be abused by such publications; to prevent which I have adopted this method, Mr. Bensley being fully able to detect any thing of this sort, he having printed and published all my works. And I do direct that the whole of the printing and publishing my said works shall be under the management of the said Thomas Bensley. And I do hereby appoint Sir William Kaye and Sir Ludford Harvey joint executors, they having been graciously pleased to express that they will perform the executorship of this my will. As for me I stand executor to no man's will; I am trustee to no place of worship; so that no troubles, from these quarters, can, in any way, fall to my executors. I give my cook ten pounds, if she is in my service when I die; and my man, Peter Spinthorp, the coachman, the like sum of ten pounds, if in my service when I die. The place of my interment I direct to be at Lewes, in the same vault in which my late valuable friend, the Reverend Mr. Jenkins, was buried. I will that they bury me in the vault that was prepared for me at Lewes; and that they lay me as near as they can to my late friend Mr. Jenkins. Let no pulpit be hung in mourning for me; let no funeral sermon be preached; let no extemporary oration be delivered at my grave; let no funeral ode be sung. The Lord Jesus Christ is my exceeding great reward; to this portion nothing can be added, and from this inheritance nothing can be taken away. And I revoke all former wills, by me at any time heretofore made."

Taken this 30th of June, 1813.

"No. 2. And as I have gone as far as I can in making her life comfortable, I hope that she will do her part towards assisting the indigent of my family.

"No. 3. And, moreover, I give and bequeath unto my said wife, her executors, administrators, and assigns, the chapel called Providence Chapel, with the vestry's yard, and appurtenances thereunto belonging, situated in Gray's Inn lane, in the county of Middlesex, for the remainder of the term therein. And it is my request that my said wife shall settle the said chapel and premises to and for the use of the congregation of Protestant dissenters assembling therein, and the minister who shall succeed me therein, in the same way and manner that I formerly settled the chapel that was burnt down, in Riding-house lane; and it is my wish that the same may be conveyed to the following trustees, namely, Mr. Thomas Bensley, Mr. Christopher Golding, Mr. John Holland, and Mr. Edward Aldridge, for that purpose; and I give the profits arising from the said chapel to my said wife for her life, she paying thereout two hundred pounds per annum to Mr. Chamberlain, or whoever it be that succeeds me in the ministry; and, after my said wife's decease, I will and direct that the said trustees shall pay to my son William and my son-in-law James Blake, and their heirs, to be equally divided between them, the sum of two hundred pounds per annum, clear of all deductions except the property tax, as a rent for the said chapel, which they

shall have no power to mortgage, nor sell, nor disturb the congregation therein."

There was also before the Court a will of the deceased, dated January 17, 1812, regularly executed, and attested by three witnesses. It gave Lady Sanderson her own fortune, left the bulk of the property amongst his grandchildren; and the rest and residue of it to his daughter Alois Clarke; and, in fine, was in most respects different from the instructions propounded; it disposed also of freehold property.

Swabey for Lady Sanderson.

Burnaby and *Phillimore*, contra.

JUDGMENT.

SIR JOHN NICHOLL.

There is no sort of difficulty in this case: there is no room for judicial doubt. The propriety of the disposition cannot be taken into consideration; all the requisites of law are complied with: it is clearly proved that the deceased intended to die testate; he had mentioned this intention several times; he mentioned it to Mr. Stone his solicitor:—he was taken ill; and, being impressed with an idea that he should not live long, he determined to go to Tunbridge Wells to see Mr. Stone: he arrived there on the 18th of June: for several days after his arrival he was so interrupted that he had no opportunity of setting about business. He did not apprehend that he should live long, yet he had no idea that he was so near his death: he sent for Mr. Stone his solicitor on the 27th of June and told him he was determined to set about his will; he does not on the next day, which was Sunday; but on the following morning he dictated to Mr. Stone great part of the paper propounded; he then said he was tired with so much speaking; that he had done enough for that day, but would proceed on the following morning; he does not do so, but a satisfactory reason is assigned why he did not; on the day after he sent a message to Mr. Stone, who came and read over the paper to him he had written at his dictation; the deceased approved of some parts, and made alterations in others; he dictated also another paper to Mr. Stone for his wife which in some degree accounts for his not having done more for his family. Mr. Stone having received by dictations the contents of this paper, the deceased then suggested something further respecting his chapel; and then added, "*he had now nothing to do that required a thought.*"

On the afternoon of the same day the deceased sent to Mr. Stone again; and asked him "if he had fully understood him as to the chapel being in trust, and the trustees." Mr. Stone replied, "he understood his intention to be, that he would leave the chapel to Lady Sanderson, with a request to convey it to the four trustees he had mentioned: and adding it was to be on the same trusts as the former chapel, fully explaining the contents of paper three." The deceased replied, "That is exactly according to my mind, or words to that effect; and added, that is all settled, you will now make it out fair, and bring it to me to sign to-morrow morning." On the following morning the deceased was seized with a fit, and rendered incapable of signing this instrument, which was all that remained to be done; he was prevented from executing it by the act of God. But having made up his mind; going to Tunbridge Wells for the express purpose of making his will; and execution being only prevented in the manner just detailed; it is as clear a case as ever came before the Court. The execution having been clearly prevented by

death, the instrument is not rendered less operative for the disposal of this property.

An application being made for costs, on the part of the next of kin,
Per Curiam.

Let each party pay their own costs.

NEWELL and KING v. WEEKS.—p. 224.

Next of kin held to be barred from calling in a probate from the circumstance of their having been conusant of a prior suit, in which the validity of the same will had been contested by other parties. K 605

JUDGMENT.

SIR JOHN NICHOLL.

Thomas Weeks, the executor of the will of Martha Trotman, has been cited by William Newell and Mary King to bring in the probate, and show cause why it should not be revoked. Weeks has appeared under protest, alleging various circumstances, and supporting them by affidavits. The proctor for Newell and King has replied to the act, and has also exhibited affidavits.

In ascertaining the facts of the case, the Court will assume the facts alleged by Weeks, and which are not specifically denied, to be true. Upon these statements it appears that on the death of the deceased, in December, 1808, no will being found, several next of kin proceeded in this Court to claim the administration. While these proceedings were going on, a will was found dated February 9, 1807. Weeks was the executor, he propounded the will; it was opposed by three persons, John Newell, and Daniel and Maria Wyatt: they were admitted by the executor to be contradictors; several pleas were given in, and about seventy witnesses were examined. The cause came on for hearing in July 1811, and the Court pronounced for the will: an appeal was carried to the delegates: before proceedings went to sentence there, the appellants declared they proceeded no further, the sentence was affirmed in April, 1812, and the cause was remitted; and on the 24th of April, 1812, Weeks took probate. In the course of the proceedings the contradictors pleaded that they, *together with William Newell and Mary Newell*, were the only next of kin, so that their interest was not only not denied, but expressly asserted and averred by the other three contradictors. These two persons, however, after all these proceedings, after Weeks had been many months in possession of the probate, under a sentence of this Court, confirmed by the Court of Delegates, call in the probate and require Weeks again to prove the will in solemn form of law; meanwhile Humphreys, the principal witness in the cause, died.

Weeks now alleges that the suit was carried on, though in the name of John Newell and the two Wyatts, yet with the privity of William Newell and Mary King; and that he and Mary Wyatt were not only privy, but had frequent consultations with the solicitors, proctors, and others, concerned in carrying on the same, and were active in procuring information to enable them so to do; and that they thereby became liable to pay a proportion of the costs. In answer to this, what is alleged on the part of Newell and King? Simply that *they were not parties to the suit, and were not cited to see proceedings*—they do not deny that they were privy to the proceedings,—that they

were active in procuring information—that they held consultations with the solicitors, proctors, and others. They make affidavits, confining themselves to the same facts: viz. “that no appearance was given for them, and that they were not cited.” Mrs. King indeed makes a further affidavit, “that she was not responsible for, and has not contributed to the costs.” William Newell does not even deny that he has contributed to the costs; so that the facts already stated of their being privy to the proceedings, of their attendance at consultations, and their activity in procuring information, are in no manner denied. It is furthermore specifically alleged, “that certain solicitors were employed for the several parties. J. Richardson on behalf of John and William Newell. William Bishop for the Wyatts and for Mary King—that Richardson and Bishop employed Hart as their agent in Gloucestershire, for procuring information; and they both instructed the proctor on behalf of their respective clients, and attended the execution of the commissions for examining witnesses; that they informed themselves from time to time of the progress of the cause, and communicated the same from time to time to their respective clients, particularly to William Newell and Mary King—so that they were as well informed of the merits and circumstances, and enabled to protect their interests as effectually, as if the cause had been carried on in their names.” All this again is in no manner contradicted—it is further stated, “that, pending the appeal, a proposal was made to Weeks, that if he would advance 100 guineas towards the expenses of the opposers, they would give no further opposition to the sentence of the Court below, nor enter any caveat on behalf of the other next of kin—that the 100 guineas were paid, upon the express consideration, as was then understood by all parties, that all opposition on the part of the asserted relations was to cease.” An affidavit is made by the managing clerk of the proctor for Weeks, to the same effect.

This again is not denied either by the proctor, or the parties themselves.

These are the facts; and, upon these facts, the real justice of the case cannot be doubted by any individual. The Court would deeply lament if any rule bound it down so strictly that it must do so great an injustice, as to allow the parties again to put the executor on proof of his will. On what do they stand? they rest simply *on not appearing, and not having been cited to appear*. If there had been distinct authorities, or a series of adjudged cases, affirming the proposition, that, in all cases where a next of kin had neither appeared nor been cited, he should possess an indefeasible right to put the executors to proof, the Court must have bowed to those authorities: but no authority has been cited to that effect, no case has been produced—no dictum even of any of my predecessors has been referred to—all that has been relied upon is, the practice *of citing parties to see proceedings on pain of their not appearing*—which proves no more than that you may affect them with a legal notice, which may bind them—but the converse of the proposition is by no means established; it does not follow that they may not be bound, or rather may not bind themselves by other means. The process of citing parties is a convenient one for all suitors, because, when that is done, you need not prove actual privity—the law presumes actual privity after the legal process—the *lis pendens* is sufficient notice that persons should appear, and protect their own interests—but if you can prove actual privity, the legal process, in point of solid justice and

sound reason, is superfluous; though, *ex abundanti cautela*, it may still be convenient to resort to it, and have it upon record.

The practice, therefore, may be explained, and accounted for upon other grounds, short of going the length contended for; viz. *that unless either there is an actual appearance, or the party is formally cited, the proceedings will not affect him however distinctly it may appear that he was privy to the whole of them*—indeed, as I have before stated, no authority, case, or even dictum, to support the rule to the extent set up, has been offered to the consideration of the Court. There are cases, however, the other way, which, though not precisely the same as this, yet show that the Court looks to substantial justice, and that which right reason requires, and does not require indispensably the strict formality of citing.

There was a case in 1802, (a) *Richardson v. Claney*, where the Court

(a) *Richardson v. Claney*, (Prerog. E. T. 1802.)

JUDGMENT.

SIR WILLIAM WYNN.

In this case a decree issued on the 28th of January, 1801, citing all persons in general having, or pretending to have, an interest in the effects of the deceased, to appear on the 30th of March, and all succeeding court days, to see the will propounded by one of the executors, and all other judicial acts, with the usual intimation; which is, that if they did not appear, the executor would proceed to establish the will. The decree is not drawn quite in the usual form, but in the fullest possible manner to affect all persons not personally served—it was served, in the only way it could, on the Royal Exchange, it not being known where any relations might be; and an advertisement was inserted in the public newspapers.

An allegation was given in, and two witnesses were examined upon it—a party appeared as first cousin; but declared that he would proceed no further. The Court in *pœnam* pronounced for the will on the third session of Michaelmas Term, 1801, and granted probate:—three days after, before it passed the seal, a caveat was entered by the proctor who had appeared before—it was warned; the same proctor appeared for Thomas Claney, and alleged him to be a nephew, and prayed an answer to his interest, which was assigned, and an affidavit of scripts by both parties. A petition was brought in that the executor might be dismissed, and the probate which had been granted might be delivered to him; and it was objected that the party, not having appeared till after sentence, could not intervene. The counsel have stated the will, and the proceedings which have taken place—this is not mere suggestion—both parties have joined in it; and the whole being before the Court, the Court has a right to refer to them. The paper is in the handwriting of the deceased—with this there is annexed to the affidavit of scripts a letter from the deceased to his agent, in which, after stating his affairs, he says he has no relation; and, therefore, that it was the more necessary that he should make his will—the will was put in an envelope, and addressed to the executors, and endorsed “This is my will.” It is objected to the will that there is a clause of attestation, and no witnesses—this is supplied, and the Court thought it supplied, by the testator’s putting the will into a cover, addressing it, endorsing it, and by other circumstances. These circumstances being all in the registry, and on record, as far as this Court can make them of record, I think I have a right to consider them, and to see what the justice of the case is, and what the party would be likely to obtain; and it does appear to me that there is scarcely any possibility that he could obtain any thing. Besides I must consider how far this person is to be considered as conusant of the proceedings—he is of the same name and family as the other who appeared; he alleged himself to be first cousin; this calls himself nephew. The assignation of the Court on the 11th of January, to give a proxy and an affidavit of scripts, is in the usual form: none was given; therefore, there was no preparation to proceed with expedition, as there ought to be in such a case. The executor is gone to the East Indies; his answers may be prayed, and then the matter must be hung up for two years. Taking all these circumstances into consideration, and having a

held that though a party was not strictly bound by proceedings in pœnam, yet in justice he could not be allowed to proceed.

Another case comes nearer the present, where the Court held that the next of kin being privy to the probate, and acquiescing in the will, was not at liberty to put the executor on proof, even though the will had not been proved per testes. I allude to the case of *Hoffman v. Norris and White*(a), Prerog. Hilary Term, 1805. This case establishes that it is not necessary, in order to bar a party from proceeding, that he shall actually have been cited here; but that the Court

just and legal right to consider them, I think this is done only for the purpose of harassing the executor, and perhaps of driving him to a compromise which this Court will never allow. Under all the circumstances of the case, I think myself at liberty to dismiss the party and to direct the probate to pass the seal immediately.

(a) *Hoffman v. Norris and White*. (Prerog. H. T. 1805.)

JUDGMENT.

SIR WILLIAM WYNNE.

George Hoffman made his will in May, 1791, disposing of real and personal property between a brother and sister, and excluding his brother Lewis Hoffman for reasons mentioned—he died in 1795. In March, 1795, the will was proved by the two executors—doubts having arisen respecting the will, a suit in Chancery was brought against the executors, and against Lewis Hoffman, praying an account, &c.—this was answered by all the parties. Lewis Hoffman, in his answers on the 26th of January, 1796, stated that he believed the deceased had made his will as set forth; that the will was duly proved; and he claimed all such right as he was entitled to as brother and next of kin; particularly submitting whether a legacy did not lapse, and that he was so entitled. On the 26th of June, 1796, the master decreed accordingly; and that, by the death of William Hoffman, the legacy had lapsed, and consequently was distributable; and that *one-third of one-half* belonged to Lewis Hoffman—pursuant to this the money was laid out; and Lewis Hoffman received the interest of the one-third of the moiety proceeding under the will, as if the legacy had lapsed.

In 1804, a decree was taken out in this Court by Lewis Hoffman against the executor of his brother's executor to bring in the probate, and prove the will. There can be no doubt but that as a brother he is entitled to controvert the will; and, if probate has been obtained in common form, he can call it in, and put the executor on proof. I do not know that there is any specific time which limits a party. The will had been proved in 1795; this decree was taken out in 1804, so that there had been a quiet possession for nine years. I think I know instances in which the Court has allowed the probate to be called in after a longer time, that may be done with cause shown:—that it may be done under any circumstances is what I cannot admit:—it would be contrary to reason, and every principle of justice. Where the opposing party has been in a situation which rendered it impossible or difficult for him to have proceeded earlier; if he has been absent from the country, a minor, or labouring under imbecility, he may be admitted. But without reason, and where there are such strong reasons as there are here to show that he was not in such a state of incapacity as to have prevented him, and further that he could not be ignorant of all the circumstances relating to the deceased, from the suit in Chancery soon after the probate was taken out, the case is different. By his answers he admitted both the will and the probate: a decree was made operating on the lapsed legacy; and he acted under that decree not upon an intestacy, and continued to receive the interest for five years together—not offering to bring up what he has received, but stating only that he had strong reasons to doubt, but did not know that he could call them in question after probate—ignorance of the law is not an excuse; but this is so plain; and, having advice as to the deceased's affairs by the suit in Chancery, I cannot admit this. He speaks of additional facts—but this is mere general assertion—there is little reason to think that a will written with the deceased's own hand in the East Indies, he having lived in this country four or five years afterwards, could be improperly obtained.

I dismiss the suit with costs.

looks to the substantial justice of the case:—the next of kin though acquainted with the will in that case, and though he had actually averred the validity of it in the Court of Chancery, yet was totally ignorant of the circumstances under which it had been made, or the state of incapacity of the deceased, or other circumstances, rendering the will invalid. There are many cases in which parties have received legacies, and afterwards contested the validity of the wills under which they received them. The suit in Chancery was not one respecting the validity of the will—it was a suit *diverso intuitu*. The will had not been proved *per testes* at all; and yet the Court held that under the acquiescence of nine years, and without cause shown, the party was barred from calling upon the executor to prove the will *per testes*; and that, before he could do so, he must explain and account for the delay which had taken place.

In the present case the deceased has been dead six or seven years—but here a suit has been instituted, the will has been proved *per testes*, and solemn proceedings have been had between competent parties in the same interest, and averring the interest of the parties who now wish to institute proceedings afresh, and the judgment of this Court has been affirmed by that of the Court of *derniere resorte*—Newell and Weeks have not only been privy to all these proceedings; but *substantially* have been parties themselves to this suit, quite as much as if they had actually appeared—Spectators to the whole, and privy to the whole, if they had been dissatisfied they might have intervened at any moment of the proceedings. This right of intervention, coupled with privy to the proceedings, is decisive to show that they can have sustained no prejudice by not having been before cited, and not having before given a formal appearance.—In the former cause they had not only a right, but it was their duty to intervene if they meant not to abide by the decision—their interests were directly affected; if the will had been set aside, they would have established their claim. The *lis pendens* served as a public notice on which they were bound to act. But that which marks if possible, more strongly the unfairness of the present attempt (though this circumstance is not necessary for the decision of the question) is the agreement made during the appeal, in which it is stated to have been expressly understood, that on the payment of 100 guineas, not only was no opposition to be given to the affirmance of the sentence, but no new caveat was to be entered by any of these parties; and the parties now proceeding do not deny the fact, or their privy to this agreement. It is a most unconscientious attempt again to put the executor on proof of the will.

As to the new facts which are pretended to have been discovered, they are stated too generally, and too indistinctly, to deserve notice; and, even if they had been more distinctly and more circumstantially stated, they would have come too late after the affirmance of the judgment of this Court by the Court of Delegates.

I allow the protest, and dismiss the executor from further proceedings; and I think I am bound to give costs against the other parties.

ARCHES COURT OF CANTERBURY.

SMITH v. SMITH.(a)—p. 235.

10 Parke, 27. 39.

Permanent alimony. A moiety given to the wife.

JUDGMENT.

Sir JOHN NICHOLL.

It is a general rule that permanent alimony shall be larger than that which is allowed during suit.—Even when the bulk of the fortune originally belonged to the husband, the Court allows a competent income to the wife. She is the injured party, and has a strong claim upon the Court: though with respect to the quantum there is no established proportion of the joint stock:—each case must depend on its own particular circumstances:—no two cases are exactly alike. But there is in this case a circumstance which ought to weigh specially in favour of the wife; viz. that the bulk of the fortune originally belonged to her; and this circumstance is still strengthened by another, namely, that the property was settled on the wife, and that she was induced, by the hope of better treatment, to give it up to her husband. He has been not only adulterous, but cruel—and, in order to buy off his cruelty, he obtained possession of the property which had been settled on his wife.

80.

It is a rule of equity that no man shall take advantage of his own wrong—perhaps it would be but just that where the husband violates the matrimonial engagement, and the fortune was originally belonging to the wife, he should give back the whole of it—Courts, however, have not gone that length—yet, in such a case as the present, this Court would give as large an allotment as in any.

In *The Countess of Pomfret v. The Earl of Pomfret*, Arches, May 14, 1796, where the fortune came principally by the wife—the income was 12,000*l.* the Court allotted one third to the wife—what weighed there was that the husband was a peer, and that the public had an interest that he should be able adequately to maintain his station.

79.

In *Taylor v. Taylor*, Consistory of London, May 28, 1791, where the property was small, the Court gave a moiety.

78.

In *Cooke v. Cooke*, ante, 178, the property came by the wife; there also the Court gave a moiety.

103.

In *Otway v. Otway*, ante, 203, where the bulk of the fortune came from Mrs. Otway, the Court would have given a moiety, but the husband had six children to maintain; and, on that account, though it gave less than a moiety, still the Court thought it placed the wife on an equal footing with the husband.

In the present case there is but one child:—an infant daughter which the husband has taken away forcibly from the wife, and which the Court considers as an aggravation of his misconduct. I shall make no deduction on that account. No doubt the wife will gladly maintain the daughter, if he will allow her to return to her mother.

The joint income is about 2,000*l.*—In addition to the 450*l.* per annum allotted to the wife pending suit, I shall allot 550*l.* per annum. She will then have 1000*l.*, and he about the same; but as the Court

(a) Vide ante, 220.

takes the husband's calculation, which may be presumed not unfavourable to himself, in all probability he will have the better half.

FELLOWES falsely STEWART v. STEWART.—p. 238.

Libel pleading the insertion of a false name in a publication of banns, admitted to proof.

PREROGATIVE COURT OF CANTERBURY.

JONES v. JONES.—p. 241.

A commission to swear witnesses insufficiently executed.

SEVERAL of the next of kin of William Jones of Sudbury, in the county of Suffolk, cited his executors to propound his will in solemn form of law.

A commission issued to take the affidavits of the executors who resided in and near Sudbury, to the testamentary scripts of the deceased. This commission was in the usual form: it was addressed to two clergymen; and it directed that the executors should be sworn in the presence of a notary public. But, there being no notary public resident within ten miles, the oath had been administered by the commissioners in the presence of two witnesses, instead of a notary public.

Jenner and Lushington for the next of kin.

Swabey and Phillimore contra.

Per Curiam.

I know how strict the Courts of Common Law are on indictments for perjury. Let a new commission issue, and the executors be resworn.

WETDRILL v. WRIGHT and Others.—p. 243.

The husband of a substituted residuary legatee entitled to an administration in preference to the husband of the sole executrix and residuary legatee for life, both parties being widowers.

PETER BLOY of Walsingham, in Norfolk, died some years ago, having first made his will, in which he appointed his wife, Mary Bloy, sole executrix, and left her the residue of his property for life; but after her death appointed his daughter Elizabeth substituted residuary legatee. The widow proved the will in the archdeaconry court at Norwich, but in no other court; and afterwards died intestate—leaving several nieces and nephews, her next of kin.

William Wetdrill the husband and administrator of Elizabeth, Peter Bloy's daughter, took out a decree against the nephews and nieces of the widow, citing them to show cause why letters of administration, with the will annexed of Peter Bloy, should not be committed to him:—an appearance was given by the parties cited;—and an act on petition was entered into.

*In this act it was alleged, on the behalf of Wetdrill, "That Peter Bloy had died leaving goods, chattels, or credits, in divers dioceses or peculiar jurisdictions, within the province of Canterbury, sufficient to found the jurisdiction of that Court, having made his will in writing, and appointed his wife Mary Bloy, sole executrix and residuary legatee; that Mary Bloy survived the deceased, obtained probate of the will in the archdeaconry court at Norwich, and, in virtue thereof, paid all the debts and testamentary expenses of the deceased, and is since dead intestate without taking upon herself the probate of the will in this Court. And it was further alleged that Peter Bloy by his will directed his wife to leave off business at the Michaelmas after his death; and that all his monies should be put out to interest to Henry Lee Warren, and the interest thereof be paid to his said wife for her life; and after her death he directed the principal to be paid to his daughter, Elizabeth Wright, afterwards Elizabeth Wetdrill; that the deceased in her life-time sold divers goods and effects, and himself placed the monies arising from such sale in the hands of Henry Lee Warren, and Mary Bloy received the interest of this money as long as she lived; and that upon her death the said Elizabeth Wetdrill became absolutely entitled under the will to the principal monies; and that Wetdrill, as her legal representative, is now entitled to the same; and that the monies now due, principal and interest, amount to 895*l.* 0*s.* 9*d.*, which is the whole of Peter Bloy's property now to be administered."*

*On the behalf of the nephews and nieces of Mary Bloy it was alleged, in opposition to this statement, "That Mary Bloy survived Elizabeth Wetdrill; and that the sum of 895*l.* 0*s.* 9*d.* above mentioned not having been reduced into the possession of Elizabeth Wetdrill during her lifetime, or into that of her husband William Wetdrill, doubts have arisen to whom the 895*l.* 0*s.* 9*d.* belongs, which question ought to be determined before administration is granted as prayed by the adverse party—that this Court is not of a competent jurisdiction to determine the same—that Mary Bloy hath left behind her divers goods and chattels; and that the parties in this cause are her nieces and two of her next of kin, and are ready and willing to take upon themselves letters of administration of her goods, chattels, and credits, and also letters of administration, with the will annexed, of the goods, &c. of Peter Bloy, and to distribute the effects of Mary Bloy and Peter Bloy according to law. Wherefore they prayed for letters of administration to them as next of kin to Mary Bloy, sole executrix and residuary legatee named in the will of the deceased according to the usual course and practice of the Court."*

*In reply to this it was stated, "That besides the 895*l.* 0*s.* 9*d.*, the property of Peter Bloy in the hands of Henry Lee Warner, there is a further sum of 200*l.*, part also of the property of Peter Bloy, to which William Wetdrill is also entitled, in the hands of Robert Sillet, the husband of one of the parties in this cause, secured by his bond, dated October 6, 1803, and interest on the bond for April 6, 1813, which sum is part of the monies placed at interest to Henry Lee Warner, pursuant to the will of Peter Bloy, to the interest of which Mary Bloy was entitled for her life, and after her decease the principal was to be paid to Elizabeth Wetdrill, which sum was, in October, 1803, taken by William Wetdrill out of the hands of Henry Lee Warner, lent to Robert Sillet; and Robert Sillet paid interest to William Wetdrill thereon for the use*

of Mary Bloy as long as she lived, and after her death to his use till the 6th of April, 1813. When Robert Sillet taking advantage of his having himself inserted the name of Mary Bloy as the obligee of the bond, though he well knew she had only a life interest in the money, refused to pay any further interest thereon." And moreover it was denied "that any legal doubts had arisen as to the title of William Wetdrill to the administration, because Elizabeth Wetdrill survived Peter Bloy; and, immediately on his death, the bequest became absolutely vested in him;" and it was alleged "that if administration, with the will annexed, should be granted to the adverse parties, several difficulties would arise in the recovery of the 200*l.* and interest secured by the aforementioned bond."

Swabey for William Wetdrill.

Phillimore contra.

This is a question between the representative of the residuary legatee, and the representative of the next of kin—in such a case the former is always preferred. Comyns' Dig. Administration (B. C.) *Sparke v. Denne*, W. Jones 225.

JUDGMENT.

SIR JOHN NICHOLL.

This question arises upon the grant of an administration of the goods of John Bloy left unadministered by his executrix.

The deceased left a widow and a daughter; he bequeathed his property to his wife, she paying to the daughter a certain sum, and after her death the whole to go to the daughter. The wife was executrix, and took probate of the will at Norwich. The daughter survived her father, and married; but died before the widow. The widow is now dead. Administration *de bonis* is prayed on one side by the administrator of the widow; on the other side by the husband of the daughter. It is admitted, and clear, that this is not a case within the statute;—the grant is in the discretion of the Court. The general principle, both by the statute and practice, is to give the management of the property to the person who has the beneficial interest in it; it is not always granted to the majority of interests: but when one party has an interest, and another no interest whatever, in that case the Court will place the property in the hands of the person who has the exclusive interest. Here the only property left unadministered is that in which the widow had clearly only a life interest; whether she had more in any part of the property must depend upon the construction of the will, which the Court under these circumstances, will not go into. Being a vested interest in the daughter, and she having married, and her husband having survived her, he has the same right that she would have had.

Wetdrill then having the sole interest, and the others having no interest at all, I shall grant the administration to him; and I do not apprehend that in so doing, I am departing from the ancient practice: the question is not between the residuary legatee, and the next of kin, as has been attempted to be maintained in argument; but between the representative of a person who had a life interest, and the representative of a person who had a substituted interest.

I shall grant it to the representative of the substituted interest.

HARRISON and others v. All Persons in General.—p. 249.

Per Curiam.

The Court does sometimes grant to more creditors than one; but it prefers that one should be fixed upon.

For the credit of the Court I trust that improper contrivances will not be resorted to for the purpose of preventing the just administration of the estate: I must, therefore, intimate to practitioners, that to follow all instructions they receive from their clients may not be creditable. The proceeding here is extraordinary—an appearance has been given for this party to pray an administration with the will annexed—the will now is brought in, and the same party appears under a protest. If he appears under a protest, I must hear him; but I must look to practitioners to satisfy themselves as to the grounds of the steps which they take.

CUNNINGHAM v. SEYMOUR.—p. 250.

Disputed wills ought to be lodged in the registry of the Court for safe custody.

Per Curiam.

Practitioners have no right to keep wills in their possession.—I have, in several instances, stated that the expense necessary to get a will out of the hands of a party must fall upon those who withhold it. The proper way is for the will to be brought into the registry for safe custody. Wherever a compulsory process is necessary for this purpose, the expense shall fall on the party occasioning it.

SHERARD and CLARKE v. SHERARD.—p. 251.

Of the appointment of an executor, held not to be revoked by necessary implication.

The Reverend Philip Castel Sherard of Godmanchester, in the county of Huntingdon, died on the 29th of November, 1814. By his will, dated the 24th August 1809, he made the following appointment of executors:—

“I nominate and appoint my three brothers George Sherard, Robert Sherard, and Caryer Sherard, joint executors of this my will; and I hereby give and bequeath to them, my said trustees and executors, the sum of 1000*l.* in case they shall take upon themselves the trusts hereby reposed in them.”

By a codicil of the 30th of August, 1809, written by himself on the back of the last sheet of the will, he thus alters the appointment of his executors:—

“I hereby revoke the appointment of my brother, Robert Sherard, to be an executor and trustee, in the above written will; and appoint, in his stead, my wife, Sarah Haughton Sherard, with all the powers he would have had; and my will is, that of the 1000*l.* bequeathed to George Sherard, Robert Sherard, and Caryer Sherard, as executors

and trustees to this my will, that he, Robert Sherard, receive 100*l.* only, and that the rest be divided between George Sherard and Caryer Sherard for their trouble in seeing my will executed."

By a second codicil, dated December 5, 1812, in his own hand-writing, on a separate sheet of paper, he made a further alteration: *viz.*

"I, Philip Castel Sherard, of Upper Harley Street, made a will some time ago, in which I appointed my brothers George Sherard, Robert Sherard, and Caryer Sherard, trustees and executors, for the purpose of carrying that my will into execution. I do now appoint my friend Sir Simon Haughton Clarke, Baronet, a trustee and executor for the purpose of carrying my said will into execution, instead of my two brothers Robert Sherard and Caryer Sherard, as he is more conversant with my affairs than they are: and I invest him with all the powers and rights which I had, in the before mentioned will, invested Robert Sherard and Caryer Sherard with for the purpose of executing my will. And my intention is that my brother George should remain trustee and executor, and that Sir Simon Haughton Clarke be joined with him only; and I hereby revoke the appointment of Robert Sherard and Caryer Sherard as trustees and executors, but wish all the rest of my will to be put in execution, and be considered as my last will and testament."

The question before the Court was, whether the widow was to be considered as an executrix; and, consequently, whether probate was to be decreed to her as well as to the Reverend George Sherard and Sir Simon Haughton Clarke, Bart.

Swabey and *Phillimore* for the Reverend G. Sherard and Sir S. H. Clarke.

Lushington and *Cresswell* contra, referred to *Ridout v. Pain*, 3 Atk. 485; *Ulrick v. Lichfield*, 2 Atk. 373; *Swinburne*, p. 1026.

JUDGMENT.

SIR JOHN NICHOLL.

The testator, the Reverend Philip Castel Sherard, appointed his three brothers executors in his will; a week afterwards he made a codicil in which he revoked the appointment of his brother Robert, and substituted his wife in his stead: this codicil is solemn and formal; he signed it; and it is attested by three witnesses. On December 5, 1812, Sir Simon Clarke was substituted as executor for two brothers of the deceased; and it is said that he shall be joined with his brother George only. The question is, whether by this codicil the appointment of Mrs. Sherard is revoked also? She is expressly appointed by a very formal instrument; the revocation, therefore, must be either express, or by necessary implication. It is not express—because there is no mention of it—it is, therefore, reduced to the consideration of whether it is revoked by necessary implication.—Taking the whole of the words together, it does not appear to me that it is. The testator recites only his will, (he does not refer to the codicil by which he had appointed his wife) and continues, "*I do now appoint my friend Sir Simon Haughton Clarke, Bart. a trustee and executor for the purpose of carrying my said will into execution, instead of my two brothers Robert Sherard and Caryer Sherard; as he is more conversant with my affairs than they are; and I invest him with all the powers and rights which I had in the before mentioned will invested Robert Sherard and*

Caryer Sherard with, for the purpose of executing my will, and my intention is, that my brother George should remain trustee and executor, and that Sir Simon Haughton Clarke should be joined with him only; and I hereby revoke the appointment of Robert Sherard and Caryer Sherard as trustees and executors; but wish all the rest of my will to be put in execution, and to be considered as my last will and testament."

He substitutes this gentleman instead of his brothers—if the word *only* was not inserted, there could be no possible doubt; but it does not seem to me that the word *only* revokes the appointment of his wife. The Court must endeavour to give effect to every word if possible; *only* one brother is left executor out of three—the word *only* seems to refer to this—such construction is fortified by what follows—if he had meant to have revoked his wife also, he would have so stated it in this part—when he expressly revokes the appointment of his brothers, and confirms the rest of his will, he confirms the appointment of his wife.

It has been conjectured that he had forgotten the second codicil in which he substituted his wife for his brother—he might have had no access to his will, on which that codicil was endorsed, at the time of making his second codicil—and this is possible from the expression "*some time ago.*" If he did not recollect the appointment of his wife, it is clear he did not mean to revoke it.

Supposing that he did recollect her, it is most extraordinary that he did not expressly revoke the appointment if he wished it not to stand—the presumption in that case must be, that he intended to have three executors—On the whole, there being no revocation of the appointment, either by express words, or, as it appears to me, by necessary implication, I am of opinion that Mrs. Sherard ought to be joined in the probate with the other two executors.

ARCHES COURT OF CANTERBURY.

FELLOWES, falsely called STEWART, v. STEWART.—p. 257.

A marriage annulled on account of the insertion of a false name in the publication of banns.

PREROGATIVE COURT OF CANTERBURY.

TAYLOR and Others v. DIPLOCK.—p. 261.

A husband appoints his wife executrix and residuary legatee; he and his wife are drowned at the same time; administration with the will annexed granted to the next of kin of the husband.

Job TAYLOR, a staff serjeant in the corps of royal artillery drivers, on his return from Portugal in the Queen transport was, on the 14th of January, 1814, wrecked in Falmouth harbour, and drowned; his wife, who was also on board the transport, perished by the same calamity.

Job Taylor left a will, in which, after bequeathing several small lega-

cies amongst his relations, he had constituted his wife sole executrix and residuary legatee:—his property amounted to 4000*l*. A question arose whether the relations of the husband or the relations of the wife were entitled to this residue: James and Richard Taylor, the brothers, and Eleanor Baillie the sister of the husband on one side, and Sarah Diplock, mother of the wife, on the other, respectively prayed administration with the will annexed to be granted to them; and Sarah Diplock prayed also in the alternative, that if not granted to her, administration with the will annexed should be granted to John France, her nominee, limited to attend certain proceedings to be had in the Court of Chancery.

The facts of the case were detailed in an act on petition, in support of which several affidavits were produced on both sides.

On behalf of the relations of the husband,

Jeremiah Barham, Joseph Minshull and John Daniells, (three privates of the corps of royal artillery drivers, who were aboard the Queen transport when she was wrecked,) made oath “That the Queen transport ship arrived at Falmouth, on or about the seventh day of the month of January, and remained there until the fourteenth day of the same month; early in the morning of which day a heavy gale of wind arose, and the said ship struck upon a rock, when these deponents who had been asleep below, went up upon the deck; and this deponent, the said Jeremiah Barham, for himself saith, that he was one of the first persons who so came upon deck, and soon after saw the said Job Taylor and Lucy Taylor his wife come up together upon deck, the said Job Taylor having a plaid cloak upon his arm: That the said Job Taylor soon after went down into the cabin, and returned on deck with another plaid cloak, which he threw over the said Lucy Taylor, who before had but little clothing on her: and all these deponents make oath that they saw the said Job Taylor and Lucy Taylor together upon the quarter deck of the ship some time after she struck upon the rock; and these deponents, the said Jeremiah Barham and John Daniells, heard the said Job Taylor offer a large sum of money to any person who would get his wife on shore; and in about ten minutes or a quarter of an hour after the ship parted in the middle, and filled with water, and many persons were then lost: but these deponents being engaged in seeking their own preservation, cannot say whether the said Job Taylor and Lucy Taylor were among the persons who were then lost, but have heard they were both drowned, with many others in the said ship.”

Robert Howarth, serjeant, and John Ratcliffe, and Patrick Mulrannan, (drivers in the corps of royal artillery,) deposed “that they heard Taylor offer 2000*l*. to any one who would save his wife, but as no one made the attempt he went down into the cabin himself;—that Lucy Taylor was of a timid disposition, and probably so terrified that she died before her husband could get near her.”

On behalf of Mrs. Diplock, (the mother of the wife,)

John Dicker, lieutenant in the royal artillery, deposed, “That Lucy Taylor was apparently of a strong robust constitution, in good health and very active; and that Job Taylor was rendered unfit for active service by a severe asthma, which frequently afflicted him to a severe degree.”

James Roe, a private in the Artillery, swore to the same effect, and “that Job Taylor, after having been on deck, went again into the said cabin by which time the said vessel began to fill with water very rapidly, which this deponent could ascertain from the circumstance of the pro-

visions laid in for the crew and passengers of the said vessel which were stowed in the bottom of the said vessel being driven by the violence of the water up the gangway of the vessel; and, thereupon, immediately and whilst the said Job Taylor remained below, in the cabin, the vessel went in pieces, when this deponent, and the several persons near him, remained on the wrecks; and in about a quarter of an hour afterwards, he, this deponent, saw that part of the said vessel *wherein was the said Job Taylor and the said Lucy Taylor, fall into the water.* And this deponent further saith, that he, this deponent was washed on shore upon the wreck of the said vessel, with about one hundred and one other persons; but that all the rest were drowned; and amongst those so drowned were the said Job Taylor, and Lucy Taylor, in manner aforesaid.

Jenner and Phillimore, for the next of kin of the husband.

The burthen is thrown on the adverse party to show that there ever was a moment in which the property vested in the wife. The presumptions of law and fact are unfavourable to such a conclusion—in the absence of evidence a natural presumption arises from the very texture and constitution of the human frame; the delicate frame of the one is less calculated to withstand the shock and buffet of the waves than the more hardy and robust frame of the other: according also to general probabilities a female is naturally timid and less likely to be possessed of presence of mind in instant and unforeseen danger than a man, especially one whose occupation it had been to face danger and death in every shape: this is no fanciful theory, it has found its way into that code of laws which had its foundation deep in the knowledge of human nature. In cases of this description the Roman law invariably founds its presumptions on the relative strength arising from the probabilities of age or strength of the two persons. “*Si(a) maritus et uxor simul perierint, stipulatio de dote capitulo ‘si in matrimonio mulier decessisset’ habebit locum, si non probatur illa superstes viro fuisse:*” and again, “*Cum(b) pubere filio mater naufragio periit, cum explorari non possit uter prior extinctus sit—humanius est credere filium diutius vixisse.*”

The evidence here fortifies the presumption of law. There is no circumstance from which any fair inference can be extracted that the wife survived. The husband's possession of the property is certain, there is no proof that the wife ever possessed it:—our claim is founded on a known fact, theirs on an unknown fact;—ours on an apparent, theirs on a non-apparent right:—they have not satisfied the obligation imposed upon them, and shown themselves the representatives of a person who ever possessed the property.

Adams and Dodson, contra.

The rules of the civil law were founded on the time of life, and the strength of body, most likely to encounter difficulty—they have no application here—the sex of the party was one circumstance; but, in the present case, the person of the weaker sex is proved to have been the strongest of the two. She was of a strong hale constitution, whereas

(a) Digest, lib. 34. t. 9. s. 3. De Commorientibus.

(b) Dig. lib. 34. t. 22. but if the son was under the age of puberty the presumption was inverted on the ground that the full grown woman was the more robust of the two. *Si mulier cum filio impubere naufragio periit, priorem filium necatum esse intelligitur.* Dig. lib. 34. tit. 5. 23.

her husband was an invalided soldier; the probabilities are strong that she was the survivor. Gen. *Stanwix's* case, and *Wright v. Netherwood*(a) are in opposition to the doctrine laid down by the other side.

(a) This case, more generally known in our courts under the denomination of *Wright v. Sarmuda*, (Prerog. Easter Term, May 6, 1793,) is reported in the notes of Evans's edition of Salkeld, 2 Salk. 593. Being in possession, however, of a very full note both of the argument and judgment, taken by one of the advocates who were present, and on whose accuracy great reliance may be placed, I have given it insertion here; and that the more readily, as the nature of the case and the ground of the decision have been frequently misapprehended.

Sir *William Scott*, counsel for Sarmuda.

This is a cause brought by the next of kin against the executor of George Netherwood to obtain the judgment of the Court on a testamentary paper, under circumstances set forth in an allegation and the answers.

George Netherwood married Elizabeth Lomax, on the 24th of June, 1783. On the 8th of Oct. he made a will charging his real estate with the payment of his debts and legacies if the personalty should be insufficient, giving some pecuniary and specific legacies, and leaving the residue to his wife by her former name of Elizabeth Lomax, spinster; he bequeathed to her also his real estate for her life—and appointed Sarmuda his executor in England, and other persons executors for his property in the West Indies. He had several children; on the 12th of March, 1789, his wife died, leaving three children by him. In Nov. 1789, he married Ann Lomax, the sister of his first wife; and had issue by her, one son, born and baptized in Jamaica. In July, 1791, George Netherwood, his wife, and her son, and all his children by his first wife, embarked for England in a vessel which has not been heard of since, but is supposed to have foundered at sea, and they all perished. Probate of the will was granted to Sarmuda the executor, who is now called upon to prove it in solemn form of law, or to show cause why the probate should not be revoked, and administration granted to the next of kin of the deceased as having died intestate. The facts stated in the allegation are admitted in the answers on which the cause now comes on. The property, by the inventory, appears to be about 8000*l.*; the legacies, given by the will, amount to 288*l.* only. Under the circumstances stated we submit that the will is not revoked:—the validity of the second marriage cannot now be questioned;—undoubtedly, by the general principles of the law, marriage, and the birth of a child, is the revocation of a will;—on the ground that it is such an alteration of circumstances, that it is not to be presumed the testator adhered to a will made before it occurred;—but it is a presumptive revocation, and may be repelled by circumstances,—if it is shown to be the intention of the deceased that it should operate, it stands notwithstanding: therefore, these cases are always open to the evidence of circumstances. There being a second marriage is of consequence, for when a married man makes his will, the wife dies, and he marries again,—in case of such man having a family, there is not such a total change of circumstances as in the case of a bachelor.

Thompson v. Shephard, in *Ambler*.—*Myall v. Duffield*, before Dr. Calvert. *Per Curiam*.

Those were cases entirely of circumstances.

Sir *William Scott*.—But this is one also—Great part of this will could not operate, the residue being given to the wife, and the legacies being but small: as it would dispose only of a small part of the property, it would not raise the presumption which would arise on the disposition of the whole or a large portion of the property. *Gray v. Altham*, Cockpit, 1752.

He could not be insensible of the existence of the will;—it must be presumed he knew its operation—small bequests only; the bulk of his fortune is subject to the statute, and would be a provision for his wife and family.

Per Curiam.

What do you say to the time of the death of the deceased and his children? it would make a difference, in case of intestacy, as to the persons interested.

Sir *William Scott*.—It would make a difference only as to the persons to be bound by the sentence, and they may take the judgment of the Court on the will.

JUDGMENT.

SIR JOHN NICHOLL.

This case is under singular circumstances; it arises upon the grant of an administration, with the will annexed of Job Taylor:—and the ques-

Per Curiam,

How was the case of General Stanwix determined?

Sir William Scott.—It was compromised at the recommendation of Lord Mansfield, who said there was no legal principle on which he could decide it.

Per Curiam.

But how do you mean to proceed? the parties here are the next of kin of the deceased on the one side, and the executor on the other

Sir William Scott.—They must resort to the Court of Chancery for directions in either case—the question is, only whether Sarmuda is to act as executor, and to pay the legacies.

Dr. Nicholl on the same side with *Sir William Scott*.

All presumptive revocations are *stricti juris*—the circumstances to revoke must be such as are totally inconsistent with the idea of the intention that the will should stand: generally marriage and the birth of a child is a revocation, because the situation is so changed; all the duties and relations are altered,—it is laid down in all the cases, there must be a total alteration of circumstances. If it would not make a material change of circumstances or disposition, which the deceased would probably make, then the presumptions are repelled,—here he clearly intended to take so much as is left by legacy from his wife and children. The disposition is nearly the same as the will made.

Per Curiam.

Do you mean to argue the question the same as if the child had survived? might not the will revive?

Dr. Nicholl.—It might,—but I must argue it so;—there is no fact on which to argue which survived; the father might be presumed to do so as the stronger, the child as the younger. There have been cases in which the presumption has not been held to take place, because there has been no such change as to induce it. *Brown v. Thompson*, 1 Eq. Abr. 312. *Cubitt v. Brady*, *Calderv. Calder*, *Prerog.* Jan. 1793,—this last was different in its circumstances,—the will was wholly inconsistent with the relation of father and husband,—he left the bulk of his fortune to his brother,—there were declarations to support the presumptions,—the residue was small, the will would involve the family in great litigation, all the circumstances tended to support the presumptions. The effect here will be only to give the legacies which the deceased meant to give from his wife and children:—to put his estate in the management of that person to whom he meant to give it, when he was a married man with children; then there is such alteration of circumstances as induces the presumption.

Per Curiam.

The case of revival has not been considered; suppose a man makes a will, and marries, and has children,—the wife and children die,—how does the case stand? In the Roman law the *agnatio sui hæredis* revoked a will,—but the death of such heir revived it. These cases are professed to have gone on the ground of the Roman law. I desire the counsel to consider this point against the next court.

SIR WILLIAM SCOTT.

According to the Roman law *agnatione posthumi vel quasi posthumi rumpitur testamentum*—on the death of the child the will revived if quasi posthumus only, that is, though not strictly by the civil law, yet *dabatur possessio secundum tabulas* by the *Prætorian law*, as by a new designation of the will of the father;—on the death of the real posthumous it did not; there the presumption could only be after the death of the testator; *Voet ad Dig. 28*. On the principles of the Roman law, the father must be supposed to survive, and the child to have died first.

Dr. Nicholl.

All perished in the same ship;—the inference of common sense is, that the husband survived the others, the child being only an infant of a year old. This was the presumption of the civil law. *D. 34. 5. 22 and 23*. *Voet in loc. D. 23. 4. 26*. *Domat. in loc.* Then the presumption being that the father and husband sur-

tion is, whether the administration is to be granted to the next of kin of the testator, or to the next of kin of the residuary legatee.

The mother of the residuary legatee had originally made a different

vived, the question is, whether his will is revoked?—there is no case where it has been held revoked in the law of England,—the law looks to the time of making,—of consummation, it was good at the time of making. A presumptive revocation by the law of England, is not so strong as the *ruptio testamenti* by the civil law. There it was completely a destruction, here it is only a presumption, which may be rebutted by any evidence. Being only a presumption, we must suppose the party departed from the intention,—the removal of those causes would as completely revive it, and in a stronger manner; for it is confirmed by the act of the testator, at least negatively in not destroying it. By the *Prætorian* civil law the will revived on the death of the *quasi posthumus*; on the presumption of intention, the party not having destroyed it. D. 28. 3. 1. Domat. 3. 1. 5.

Dr. Battine, contra.

An exception to the general rule of *revocation* in the case of a widower has been stated; but I do not know the case stated;—the will is as much revoked by marriage and the birth of a child, as if it had not been made;—it could not be the intention that it should exist in the change of circumstances, after the birth of many children; less so, when the party had contracted a marriage a second time. It has been compared to the case of a posthumous child, who not being provided for, would not affect a will;—but that is only a partial change. We allow the general rule of the civil law, as to the survival of the father; there is no admission of the fact here that the child died first, there is no proof of it; they all died by shipwreck,—*agnatio posthumi, vel quasi agnatio posthumi*, destroyed the will. D. 28. 3. 2. D. 28. 3. 12. Legatees are let in merely on account of the presumption in favour of the *hæres scriptus* for whom the intention of the testator is to be presumed. The general presumption is, that a will is set aside by marriage and the birth of a child. The rule of the civil law is, that though the child die the will would not revive.

Dr. Swabey on the same side with *Dr. Battine*.

It appears by the inventory that the estate is worth about 8000*l.*; the freehold, as far as we can guess from the arrears due, is 27*l.* per annum only; the will is executed in duplicate. Whether a question may arise hereafter, to whom the administration is due, on the question of survivorship, stands clear of the present question. The civil law has been accurately stated on the other side. Zouch qu. 3. The law is, that the will is equally revoked whoever survived. By the death of the child, it is said that the will is not revived by the law of England; they assume this doctrine from the civil law; but I deny this. The general principle is, that marriage and the birth of a child revoke a will. There have been many decisions on the point; the principle on which they have been founded is the change of intention grounded on a total change of circumstances: it has been said the change is not so great in the case of a widow as in that of a bachelor. *Salmon v. Sullivan*, before Dr. Day, was cited by Dr. Calvert in *Myall v. Duffield*, as deciding equally the revocation in one case as the other. There is no case where the quantity of property affects the revocation. *Altham v. Grey* is mis-stated in Ambler, as appears from Sir George Hay's argument in *Shepherd v. Shepherd*, 5 T. R. ; *Brown v. Thompson*, 1 Eq. Ab. 413. The general rule is, that it is a revocation, unless there is evidence to the contrary. In *Thompson v. Myall and Shepherd*, (in the Prerog.) Dr. Calvert decided on the declarations and evidence of intention that the will should stand. From a note of Dr. Paul's, it appears, that in *Barrow v. Baxter*, (Prerog. 1695,) Baxter made a will in June, 1680, in which his sister and her husband were executors:—it was contested by his widow, who set forth that on the 26th of June 1686, he married her, and had issue a son, born twelve months afterwards, who lived three years, but died before his father:—these facts were admitted in the answers, setting forth also that the wife's fortune was secured to her by settlement. A plea was given in, stating misconduct of the wife, and ill treatment of the husband by her,—there were depositions establishing this fact; and one witness spoke to her insanity. The Court held the will to be revoked.

If the quantity of property disposed of is admitted to be of consequence, the

prayer, viz. that this court should grant an administration for the purpose of substantiating proceedings in the Court of Chancery, and suspend its own proceedings till the Court of Chancery had decided the

decision must be a very uncertain criterion; one judge may hold one quantity sufficient, and another may hold another. The second wife succeeded to the same place in the deceased's affections which the first had, why are we not to presume that there was an intention she should be provided for? A duplicate also was executed; and this is material to show that one will was with the testator which it was in his own power to revoke at any time. According to the civil law it was presumed that the father survived for a little time, when a will was held revived by the Prætorian law; it was on the presumption of the revival of intention. This was the equitable rule, not the strict law founded on the presumption of intention,—where there was no such intention the will was not supported as in case of the death of the real posthumous, where the father was dead before, is the exception; there could be no intention; the same rule applies here where the father survived so little time, in such particular circumstances. I do not think the rule is derived from the civil law:—the child was the only object there, the wife none; the marriage was on a different footing:—marriage is no revocation; the birth of a child was an actual, not a presumptive revocation.

Sir WILLIAM SCOTT in reply.

Zouch leaves every thing in doubt.

Per Curiam.

That work was not designed as an authority for courts; but as a disputation for the schools.

Sir William Scott.—The rule of the civil law was, as has been laid down, the death of a quasi posthumous child set up a will again: it is not necessary to show that the father lived a considerable time after. If it is established by evidence, on presumption that the father survived, it is sufficient;—it is not necessary to prove the intention, the rule of law takes place. In *Barrow v. Baxter*, it does not appear that there were not other circumstances in the case; there might be many; it seems to have been a case of intention, it would certainly go some way to show that the rule of the civil law is not adopted.

In *Salmon v. Sullivan*, it is not stated that the party was a widower with children,—if he was without children, it is the same as if he was a bachelor.

In *Calder v. Calder*, the court said all the circumstances were to be considered; that the quantity of property given was of consequence, to see how far the wife and children were deprived of subsistence—it is extraordinary, if marriage and the birth of a child do revoke any testamentary paper giving even a small legacy, that no such case has been brought before the courts. Lord Mansfield in *Cubitt v. Brady* declared he knew none where there was not a total disposition. There are many small legacies to friends, as probable an intention of the deceased as a provision for his wife. The smallness of the property is a very material part of the evidence; if it is such as he might naturally dispose of after marriage and the birth of children, the presumption is weaker, and less evidence is sufficient to sustain the will. If the authority of the Roman law had been considered; the case of *Barrow v. Baxter* would have received a different decision. It is generally allowed that the doctrine is taken from the civil law, though we may not have adopted all the particular rules of that law,—no part of it is more reasonable than the revival under these circumstances.

Dr. Nicholl, on the same side in reply.

I do not agree in this case that it is either an absolute revocation, as if the will had not been made; or an absolute taking effect, unless there is evidence of intention afterwards. I think as Lord Mansfield did in *Cubitt v. Brady*, that it is merely a presumption to be taken away by any evidence. It had been said, the reason in *Brown v. Thompson* was that the provision made would go to the same person,—the wife would take care of the children;—the presumption here is that it was left to her to take care of them. It has been said the change of circumstances is the only principle;—this is not so, but it is the intention to be inferred from such a change. Then if the situation of the deceased is such that but a little change of circumstances is effected by marriage and the birth of a child, and the intention might reasonably be to make the same disposition, then there is no presumption from intention. Here there is no material alteration in

point:—The Court would have been glad to have devolved its functions in this instance on the Court of Chancery, but it had not the power to do so; it is bound to proceed, the two jurisdictions might take a differ-

circumstances: he made his will when he married; when he died he was substantially in the same condition,—the residue under this will was lapsed, and would be a provision for this wife and child. The residue is never held immaterial;—there are very few legacies which the deceased clearly intended always to give, and it was always his intention to give the management of the estate to these executors.

JUDGMENT.

SIR WILLIAM WINNE.

George Netherwood executed a will in October 1783, by which he gave 288*l*. in legacies, and left the residue to his wife by the name of Elizabeth Lomax, spinster,—he left his real estate to his wife for life, and the remainder to a cousin: he appointed Mr. Sarmuda his executor in England, and other persons in the West Indies—the personal property by the inventory amounts to 8,000*l*.; the real estate as far as appears, is about 27*l*. per annum.—The probate which had been granted to the executor is called in,—and the executor is called upon by several cousins-german to show cause why the deceased shall not be pronounced to have died intestate. An allegation has been given, and answers taken to it:—on them the cause is brought on. The facts of the case are, that after the execution of the will, i. e. in March 1789, the wife died, leaving children, in November 1789, he married Anne Lomax, her sister; this is not material after the death of the parties,—and had issue one son. In 1791 they all embarked together, the husband, the wife and her child, and the children of the first marriage, from Jamaica; and they have not been heard of since. The vessel is presumed to have foundered at sea, and all to have perished. It is contended by the next of kin that by marriage and the birth of the child this will is void by implication of law,—while on the other side it is maintained that the circumstances of the case are sufficient to rebut the presumption.

It is said there is a duplicate, and that circumstance would be of consequence; if it appeared that the will was in England all the time the deceased was absent, so that it was not in his power to resort to it, though it does not appear; the other might have been in his custody all the time. Therefore this is not in the consideration of the court. The office never asks for a duplicate. It has been argued for the executor that though a will made by a bachelor is void, yet if a will is made by a widower or married man having children, this would make a difference; and in support of this they have referred to the case in the margin of Ambler which seems a mistake,—it is certainly so, if this is the same case which was here before Dr. Lee, which I think it is not. I cannot see the principle. I take the principle to be change of circumstances founding the presumption of a change of intention. I do not see why he is not to be presumed to have the same intention for the second wife and her family as for the first—I do not see the principle on which to make any alteration:—then there is no difference whether it be made by a widower or a bachelor.

The argument is by far more weighty which is founded on the operation and effect of the will under the circumstances,—the legacies to his friends are small in proportion to his fortune,—by the death of his first wife the bequest of the residue lapsed: therefore the children by the second wife would have come in for an equal distributive share with those by the first.—There is a declaration of Lord Mansfield in *Cubitt v. Brady*, intimating an opinion, that he went on the total deprivation of fortune to the children;—if a small part is given,—only legacies to friends, and no more, and an ample provision is left for his wife and children, I know of no instance where the will has been held revoked. I think that the principle does not militate against this.

Here the testator gave small legacies to his friends, and gave the bulk of his fortune to his wife;—probably this was early after the marriage; probably most of the children were born after. The birth of a child only, is not a revocation, he might mean to leave the children in her power.—It is not improbable that the deceased might suffer the will to remain, notwithstanding the second marriage and the birth of the child, knowing the effect of it.—Then I think there is

ent view of the question. The matter has not now been gone into;—the argument has been confined to which of the two parties is entitled to the administration.

The first and preliminary question is, on which side lies the presumption? on whom the burthen of proof? The administration prayed is not to the wife, but to the husband—*prima facie*, it belongs to the next of kin of the party deceased—to him and to his property the wife, or next of kin has a right to administer under the statute of administrations.

But it is laid down in the books, that in case of there being a residuary legatee, the statute does not apply. The next of kin has the *prima facie* right; but if there is a residuary legatee, he would be entitled;—there is no such person here, for the party claims derivatively from the residuary legatee.—The burthen of proof lies on him, to show that the deceased left a residuary legatee;—the next of kin of the residuary legatee is to show that the wife survived her husband. The same was the rule in the civil law, as has been satisfactorily stated in argument,—the proof of the wife's surviving must be shown, otherwise the deceased left no residuary legatee.

If we resort to the probability of what the deceased would have done; can it be supposed that he would have allowed the whole of his property to have gone from his own brother and sister to his wife's relations? but the presumption of law is more worthy the consideration of the court;—it is in favour of the parties, on whom the law would throw the right. The civil law is in favour of the last possessor.

Thinking, as I do, that it is incumbent on the next of kin of the wife to prove her survivorship; how stands the case on the evidence? There is no evidence direct as to the point:—some inferences have been deduced,—it is stated in the first affidavit, that the two bodies were found together; this tends to show that they were in the same situation at the

strong ground to contend that if he died, the second wife and her child surviving him, that the case is not within the rule.

But in the case of *Barrow v. Baxter*, it seems that the court was of opinion that the death of the child subsequent to the will would not make any alteration;—there having been a marriage and birth would make the revocation take effect, —nothing after would alter it.

I think this is the same case as the *questio vexata* here, and at common law,—of a man making a will,—then a second will, and then cancelling the second. It would have been held here down to *Helyar v. Helyar*, before Sir George Lee in 1756, that the first will remained revoked.—That case was appealed to the Delegates, but never came to a sentence.—In the courts of common law, as in *Glazier v. Glazier*, it has been held that the first will would be re-established. In *Cubitt v. Brady*, Buller, Justice, said, *Implied revocations depend on circumstances at the death of the testator*. Therefore I desired the fact to be considered of their having all perished in the same ship. In the Roman Law there is no doubt by the latter Prætorian law which is to be considered as the amended law, —*Revocatio agnatione sui hæredis* would perfect the revocation;—it was not implied that it should revive.

I desired the priority of the death of the parties to be considered. I always thought it the most rational presumption that all died together, and that none could transmit rights to another, which seems the opinion of Zouch.

Then what are the circumstances at his death? He had neither wife, nor children; therefore there is nothing to raise the implication of revocation at that time. Under these circumstances, therefore, considering that great part of the property lapsed which would raise a great doubt whether the revocation was to take place,—and taking into consideration the other circumstances that there was no wife, or child at his death, I pronounce for the will.

time of death;—for it is improbable if one had been in the cabin and the other on the deck, that both should have been thrown up together;—supposing them in the same situation, the ordinary presumption that the husband has more strength and more fortitude would raise the inference that he had survived. The facts stated in the first affidavit seem to support this idea, *viz.* “that Job Taylor being on the upper deck, offered 2000*l.* reward to any one who would go below, into the cabin, and endeavour to save his wife; that the water had at that time entered the cabin, in which Lucy Taylor was, to the height of several feet; and Job Taylor finding no one willing to make the attempt, went down himself into the cabin, and there is every reason to believe that Lucy Taylor, who was of a timid disposition, was so terrified by her perilous situation (for the vessel had split in the middle,) that she was in a dying state before her husband could get near her.” An attempt has been made in the other affidavits, at a different representation,—but these affidavits ought to have been brought in originally; the Court is not quite clear that it did right in admitting them; because, before they were made, the persons making them had seen the other affidavits and heard the intimation of the court as to the gist of the case.—These affidavits, however, do not satisfy my mind, that the wife survived. The whole that Lieut. Dicker states is, that the wife was active and bustling, and the husband was afflicted with an asthma;—but he had not seen them since the September preceding. She might have been active and bustling; but, in a moment of danger, the timidity of her sex might overpower her:—on the other hand, the husband might at times have suffered from an asthma, and yet in the moment of difficulty been able to exert himself with effect.—None of the witnesses represent the husband at the moment to have been in a weak infirm state,—none represent him as having lost his recollection.

Looking at their comparative strength, there is nothing to take away the ordinary presumption, that a man was likely to survive a woman in a struggle of this description;—still less is there any thing to prove the contrary.—James Roe, in an affidavit brought in so late, in contradiction to the first, is in some degree in contradiction to all the others: I cannot rely on the accuracy of this witness; he places the parties in a different situation from the rest: but even if he were correct, it would be merely founded on a slight presumption, that the person in the cabin would die first.—Three persons have sworn that they saw them both together.

Upon the whole I am not satisfied that proof is adduced that the wife survived: taking it to be, that both died together, the administration is due to the representatives of the husband.—I assume that they both perished at the same moment, and therefore I shall grant the administration to the representatives of the husband. I am not deciding that the husband survived the wife.

The Proctor for Mrs. Diplock prayed that the sureties might be compelled to justify.

Jenner and Phillimore. This is contrary to all practice.

Per Curiam.

Great caution should undoubtedly be used; but I believe the application is unprecedented. I wish the registrar to state whether he has known an instance of it.

6 E.C.R.
430.

The Registrar, (Mr. Gostling,) said he had been registrar 40 years, and could remember no instance of it.

The application was rejected.

CONSISTORY COURT OF LONDON.

CRESSWELL v. COSINS, by her GUARDIAN, falsely calling herself CRESSWELL.—p. 281.

An additional article to a libel in a cause of nullity of marriage, by reason of minority, rejected.

JONES, falsely called ROBINSON, v. ROBINSON.—p. 285.

Nullity of marriage by reason of minority established, the woman being a Jewess.

ARCHES COURT OF CANTERBURY.

STALLWOOD v. TREDGER.—p. 287.

A church being under repair, and shut up, a publication of banns in the church of an adjoining parish held to be sufficient.

CONSISTORY COURT OF LONDON.

The Office of the Judge promoted by CANNING v. SAWKINS.—p. 293.

A parishioner suspended ab ingressu ecclesie for three weeks for brawling in the chancel of a church.

PREROGATIVE COURT OF CANTERBURY.

INGRAM v. STRONG and ROBERTS v. LAWRENCE.—p. 294.

A conditional will not converted into an absolute will, it being shown that the condition had been satisfied.

RICHARD TRAVERS, of Uploders, in the county of Dorset, died on the 28th of July, 1813, possessed of a freehold estate, valued at 40,000*l.* and personal property amounting to about 6000*l.*

The following instruments were propounded as his will:

No. 1.—A will dated January 8, 1804, in the hand-writing of the testator, and executed in the presence of three witnesses. It was of considerable length;—it bequeathed all his freehold, leasehold, and copyhold estates, and all his personal estate and effects to his friends and

relations, John Strong and Richard Roberts, upon trust, to sell all the estates and effects, and after discharging his debts, and funeral and other expenses, to apply the remainder to the payment of his legacies. These legacies, varying in amount, were to upwards of sixty of his relations and friends. It was declared also, that if the legacies bequeathed should be found to exceed his property, a proportionable abatement should take place on each legacy; and, on the contrary, if it should exceed it, to have the like proportion added to each legacy.

Mr. John Strong and Mr. Richard Roberts were appointed executors.

To this will there were added two codicils, one dated the 9th of January, 1813,—the other 26th of June, 1806.

No. 3. was as follows:

“Weymouth, July 31st, 1806.

“I Richard Travers, of Uploders, in the county of Dorset, being of a sound mind and understanding, do this day, as above written, make this as my last will and testament, (that is, *in case my last will, before this wrote in my own hand, and witnessed by John Way and others, should be by any of my relations disputed,*) as follows, I give unto Captain Nicholas Ingram and Fanny Roberts of Brown’s Farm, in trust *for their sole disposal*, all my landed and personal property, of every kind and description whatsoever, goods, chattels, monies, with every other thing that I am possessed of, to my relations and friends, in such proportions as they shall think right, just, and proper. I give and bequeath to each of them five hundred pounds for their own private use, as a compensation for their trouble. *I beg to observe that I am at this time of a perfect understanding* and fully convinced that my two worthy friends will do great justice to this my last request, in the disposal of my property and effects. As witness my hand,

RICHD. TRAVERS.

“Published and declared in the presence of, and witnessed by us,

WILLIAM NEEDELL,

JOHN HELLIER,

RACHEL SLADE.”

This will was folded up as a letter, and endorsed,

“Captain Ingram,

“Weymouth.”

This is to be opened by Captain Ingram, but not by any one else.

No. 4. was to the following effect:

Memorandum made this July 2, 1813; Admiral Ingram and Mrs. Roberts are desired to go by this paper as a direction for them in the will that I have placed in Admiral Ingram’s hands.

	John Strong,	-	-	-	-	-	£1000
	Saml. Strong,	-	-	-	-	-	1000
	Mrs. Davis’s family,	-	-	-	-	-	1000
	Messrs. Burts,	-	-	-	-	-	1000
	Richd. Roberts children,	-	-	-	-	-	1000
	Robert Robert’s children,	-	-	-	-	-	1000
own use	Mrs. Richards,	-	-	-	-	-	1000
	Not Husband						
	Wm.						
	Mrs. Roberts’s child	-	-	-	-	-	1000
	crem						

The Bowring famy,	-	-	-	-	-	1000
Mrs. Cook, a <i>hundred</i> ,	-	-	-	-	-	100
Rich ^d . Gill,	-	-	-	-	-	500
Rob ^t . Gill,	-	-	-	-	-	500
Messrs. Burts,	-	-	-	-	-	1000
S. Honeybourn,	-	-	-	-	-	500
S. Hyde,	-	-	-	-	-	500
Fanny Hansford,	-	-	-	-	-	500
Mary Gill,	-	-	-	-	-	500
						<hr/>
						13,100

Henry Gibbs,	-	-	-	-	-	200
Capt. Lawrence,	-	-	-	-	-	500
John Hallett, the part of his mother and aunt,						500
Henry Gibbs' unmarried sister,	-	-	-	-	-	100
The two who married Northover, each	25£					50
Peggy Best,	-	-	-	-	-	200
Jenny Lawrences children equally,	-	-	-	-	-	200*
John Sutherlands two children, William and Mary,						500
This is for Admiral Ingram, to go by Sabines,						

R. TRAVERS.

Jos. Way, Jun. 200† in trust.
 Capt. Lawrence.
 Sir Evan Nepeans's
 The Snaydons to be guarded against. ‡
 Henry Gibbs, Jun.

Lawrence family
 Capt. Lawrence
 Peggy Best, suppose 3 child^{ren}
 Nancy Knight, no child
 Jenny left two children
 Fanny Gibbs
 Mary Sawkins.

Further Legatees,
 John Budden, Uploders
 John Axe, Loders,
 Henry Gale, Upton,
 John Hallett, Shipton.

No. 6. was an incomplete testamentary paper, entitled "An account of Richard Travers's relations," in which there are the names of several relations and other persons, with sums opposite their names,—and at the bottom the following memorandum:—

"*These are the instructions given by Richard Travers to Giles Russell, to make his will by to-morrow morning.*"

No. 5. was a fair copy of No. 6.

No. 1. and the two codicils annexed to it were propounded by Mr. Strong and Mr. Roberts. No. 3. and No. 4. by Admiral Ingram; and

* This should be only 20£

† This should be in full.

No. 5. and No. 6. by Captain Lawrence. There were several other testamentary papers of an older date before the Court, which were not propounded.

Allegations were given in on behalf of the several parties contesting suit, and witnesses were examined upon them. There was full proof of the due execution of the will of Jan. 8, 1804, and of the two codicils annexed to it,—of the testator's sanity on the 31st of July, 1806, the date of the conditional will, and of his dictation of No. 5, the last testamentary paper.

With respect to the other points of the cause; Thomas Marsh deposed, “that he went to see Mr. Travers on the 26th of July, 1813,—that he found him confined to his bed,—that while sitting by his bed-side, Admiral Ingram and Capt. Lawrence came to visit him; and after enquiring after his health, Admiral Ingram almost instantly said, ‘For God’s sake do make a will, that the one in my hands may be done away with, and Mrs. Roberts and myself may not be left in so much trouble that we shall never get rid of as long as we live.’ Admiral Ingram then stated to all present, that the deceased had by the will which he had made, and which was in his hands, given him and Mrs. Roberts the power to give away all his property as they liked. He then strongly and repeatedly urged the deceased to make another will, and used several arguments and persuasions to induce him so to do, and kept desiring ‘that he would for God’s sake make a will;’ by which the deceased seemed very much agitated and disturbed; and answered that he would make a will, and would send for Mr. Russell, (meaning his attorney,) to do it; upon which the deponent offered to go for Mr. Russell for him, but the deceased declined his offer, and said that he would write a letter to him and sent a boy with it, or to that effect: and a pause having then taken place, without a word being uttered by any one for a minute or two, and the said deceased seeming then to be very uneasy, and disturbed, and restless, and his face having flushed up as red as fire, he then said—‘I want Betty, I want Betty,’ (meaning his maid-servant, Betty Bishop, then Betty Bagg,) and appeared quite anxious to get rid of the conversation. And thereupon the said Admiral Ingram, Capt. Lawrence, and the deponent left the room; he, the deponent, having told the said deceased, (when he was about so to leave the room,) that he would see him again to-morrow: and the deceased having answered, ‘Do so.’ And when the deponent had left the said deceased’s room, he told the said Betty Bishop, then Betty Bagg, (who was an old and confidential servant of the said deceased, and who had withdrawn and absented herself from the room whilst the aforesaid persons were so with the said deceased,) that her master wanted her, upon which he had no doubt but that she immediately went into the room to the deceased. That on the next day he repeated his visit to the deceased, and found him still confined to his bed and Mrs. Roberts sitting by his bed-side, and the deceased said, we are talking over things I wish you to hear; and then entered into a conversation as to the legacies he intended to leave his relations, and named many of them, and discussed the claims they had on him, and mentioned his intention to give other legacies, and took up a paper which was in his own hand-writing, and which was a list of such persons, and added some other names to them.” And he says that he had engaged in this conversation with the deceased, *under the impression that he had no other will than that which Admiral Ingram had*

spoken of; but the deceased, at this particular period of the conversation, said, "I have a will by me; and taking up a folded paper in his hand from off the bed, (consisting apparently of more than one sheet of paper) said, and here it is; if I die I shall not die without a will; but I want to alter some things in it, as some matters have occurred since that I wish to provide for, and I want to do something for my poor relations: and you see if I could give Henry Gibbs and a few others, some of whom he named, the value of 100l. a-piece or so, what good it would do them."

Betty Bishop deposed to the visit of Admiral Ingram and Captain Lawrence on the 26th July, 1814; and said, "that after they were gone the deceased called to her, and asked her why she had not come before to cut off the tale of the Admiral, (meaning the said Admiral Ingram) 'he has been bothering me about making of my will;'—and the deceased seemed very cross and out of humour, and she answered, 'Dear Sir, I did not know I must come when the gentlemen was here.' And the deceased replied, 'You know it is my particular wish for you to be here:' and he then further said, 'I don't know what they see in me, they are so anxious about my making of my will.' And the respondent then further answered, and said, 'It is nothing but right, Sir; you should keep a will by you, you be'ent dead never the sooner, and I hope there's no likelihood of death now.' And he the said deceased then replied, 'I have got a will, Betty; but I wish to make some alterations upon the account of my poor relations.' That the respondent, being much moved at such the deceased's conversation, went for a minute or two into the adjoining room, that he might not see her shed tears; and, on her then returning into the said deceased's room almost immediately afterwards, he said to her, 'Betty, I would have you kill a couple of chickens. I think to send up Gill this evening to desire that Mrs. Roberts, (meaning the aforesaid Fanny Roberts,) will come down to-morrow, and to-morrow I think to write over to Mr. Russell, and to desire that he will come over and see what we can do;' meaning, as the respondent understood and believes, in respect to his, the deceased's making such his intended alterations in his will."

Robert Gill deposed to the deceased giving him for the purpose of getting a will drawn up;—to his requesting him to call on Mrs. Roberts on the evening of the 27th of July, desiring her to come to him the next morning, and assist him in making his will; to his sending for Mr. Russell, his attorney,—to his vexation at not finding Mr. Russell,—and to the deceased's requesting him on the following morning, (the 28th,) in the presence of Mrs. Roberts, to write down instructions for his will;—to the deceased's dictation of these instructions, as contained in No. 6.;—to his reading them over to him,—and to the deceased's directing him to transcribe them fair;—and to his approval and subscription of the copy so transcribed, No. 5.;—and to the deceased's saying that "*he hoped he should live till the next morning, that he might finish his will.*"

Jenner and Lushington for No. 6.

This paper contains the whole will of the deceased, at the time it was written,—it is complete as far as it goes;—we propound it as containing the last intentions of the deceased, prevented from formal execution by the act of God. It is probable the deceased intended to have added the disposition of his real estate to the will the next day; but this

does not vary the question;—the paper, as far as it goes, is complete;—it is substantive in itself, and fully entitled to probate.

Adams and Cresswell for No. 3 and No. 4.

The capacity of the deceased is not affected beyond lowness of spirits;—we must assume that the instrument was executed in a perfectly sound mind;—it was dictated with a view to disputes which might arise amongst his relations;—whether the condition be fulfilled or not is immaterial;—his relations have opposed the will, and there has been sufficient dispute about it to satisfy the condition at all events;—but, taking it for the sake of argument, that the condition is got over, the deceased recognized this paper without any reference to the condition, when he alluded “*to the will he had placed in Admiral Ingram’s hands.*” he evidently alludes to this, as making the will of 1806 complete in its dispositions. It should seem from the evidence of Mrs. Roberts and Mr. Marsh that there was a complete approbation of the will, without a reference to any condition. No. 3 and No. 4, make that disposition alone which the deceased intended to complete.

Swabey and Phillimore for the will of 1804, and the two codicils annexed to it.

JUDGMENT.

SIR JOHN NICHOLL.

The facts of this case lie within a narrow compass—and cannot be the subject of much controversy.

Mr. Richard Travers died in July, 1813. He had been in business at Bridport, in partnership with Mr. Roberts, and had amassed a considerable property both real and personal: but he had met with some risks in the course of his business, which occasionally affected his mind with a lowness and depression of spirits; but there is nothing shown which at any time amounted to actual insanity.

Several points are clear;—his intention to die testate,—for there are several testamentary papers before the Court of anterior date to the will of 1804: his intention to make a disposition of his property amongst his relations and friends on a very extensive scale:—and also his intention that his real as well as his personal property should be subject to this distribution.

There are three parties before the Court propounding severally the following testamentary acts. A will and two codicils of 1804. A will of 1806 with a further paper of directions. A paper of instructions of July 28, 1814.

The first is propounded by the two executors named in it, Strong and Roberts, who were personal friends of the deceased. The factum of this will, and of the two codicils annexed to it, is not questioned; it is executed and attested in the usual way—it gives all his property, real and personal, in trust, to pay his debts and legacies; and then proceeds to distribute his property, by legacies, amongst his relations and friends, to the amount of upwards of fifty; and afterwards directs that if the legacies exceed his property they shall be proportionably diminished; if they fall short of his property they shall be proportionably increased; and he appoints Roberts and Strong executors. Thus this will is a complete disposition of his whole property—real and personal:—it is uncanceled; and must operate either in the whole or in part, unless it is revoked by some subsequent act of legal validity.

In 1806, the deceased made another will which is also attested by three witnesses. This is propounded together with another paper which I shall notice hereafter, by Admiral Ingram, one of the executors named in it. It gives all his property to Mrs. Ingram and Mrs. Roberts to *be at their sole disposal* among his relations and friends. This is a strange disposition: and there is a very singular and unusual passage in it; viz. "*I beg to observe that I am of perfect understanding.*" This was probably written when the deceased was in low spirits; and, from another passage in it, probably when he was under some irritation, and when he had heard that some of his relations, or his heir at law had said that he was not capable of making a will, and that they should dispute his former will;—but still there is no sufficient ground to impeach the sanity of the deceased at this time, so as to render invalid a will executed regularly, and attested by three witnesses; more especially as in a subsequent part of his life when there can be no question of his sanity, he recognized this paper. There is, however, another important passage in this will which gives it a peculiar character. He states that he makes it "*In case my last will before this, wrote with my own hand, and witnessed by John Way and others, should be by any of my relations disputed.*"

Perhaps the object of this clause, and indeed of the whole will, is rather to hold *in terrorem* to his relations, "If you dispute what is done, or are dissatisfied, these friends shall have power to controul you, and divide my property among you in their discretion," trusting that they would dispose of the property in the manner mentioned in the other will; and it is not impossible that he meant it as an additional guard to the will of 1804. It has been contended that this clause does not render it a conditional will, and that he only meant to assign the reason for his new disposition;—but this would be a forced and strained construction,—the more obvious meaning is to impose a condition, and that it was only to be called into operation in case his relations disputed the will of 1804:—I hold, therefore, that it is a conditional will, and necessary to be got rid of either by converting it into an absolute will by a subsequent act, or by satisfying the condition. A conditional will may be converted into an absolute one; and it is for the Court to consider whether the paper propounded with it, or any other paper can produce that effect.

From 1806 till within a few days of his death he did nothing further towards any testamentary act, except that in December, 1811, he wrote the paper D. which is entitled, "a memorandum for making my will." It contains a very detailed list of his relations and friends and their respective families, but no sums are annexed to their names; and it also contains some calculations of his property. Admiral Ingram's name occurs, not as an executor, but among the list of his friends. This paper too is rather contrary to the tendency of the conditional will, and implies rather that he himself meant to do an act of distribution, and did not mean that Admiral Ingram and Mrs. Roberts should have the disposal of his fortune.

The deceased died on the 28th July, 1813. On the preceding Sunday (*i. e.* the 25th) he was visited by Mr. Roberts, and Mr. Strong, the two executors in his will of 1804; and there is no sufficient reason, in the judgment of the Court, to doubt that he continued his confidence in them till his death. He said nothing, however, to them about any

intended alteration in his will, and probably had given up all thoughts of making a new will.

On the following day (the 26th) Admiral Ingram visited him—he, having had the conditional will of 1806 placed in his hands, was distressed, as he naturally might be, at the discretionary power vested in him; and, perceiving the deceased to be in a dangerous state, he pressed him to make a new will, and the deceased promised him so to do: but it certainly is highly probable that he would not have done it unless urged by his representations. It appears from the evidence of Mr. Marsh who was present, and Betty Bishop, that the deceased was disturbed at being thus pressed;—Marsh offered to go for his solicitor, but he declined it. On that evening however the deceased sat down to draw a paper of instructions for Admiral Ingram and Mr. Roberts. Mr. Gill, a relation, who was much with the deceased, found him, on the evening of that day, with a table and writing materials before him. Probably he was engaged in writing No. 4.; for he asked Gill if he knew any thing about the Lawrence family,—he desired Gill to call upon Mrs. Roberts, who was co-executor with Admiral Ingram, and to desire her to call the next day to assist him in making his will.

No. 4. is entitled *memoranda* made this 2d July 1813.

Where he first stopped and signed, the name is again repeated.

The name, however, is signed, not as finishing it, but as authenticating it as far as it had gone.

The object when he wrote this paper was to remove the condition;—he had not completed it; many persons are inserted without any sum annexed to them. It is incomplete, and unfinished—if he had gone on with this plan, and had finished No. 4, as a complete body of directions, and afterwards done no further act, it might have been a question whether the conditional was not converted into an absolute disposition, and the will of 1806 completed and confirmed by such an act.—Because when such new directions for an entire disposition of his property had been given, and that distribution was to be made by Mr. Ingram and Mrs. Roberts, whatever his original intention might have been, and however he might have allowed his executor to distribute his property if his relations disputed his will, yet now he had made a new distribution for himself, which superseded the former disposition made in 1804.

But No. 4, in my apprehension, can have no such effect, for he gives up this plan;—he determines on making an entire new will;—he makes out an entire new set of instructions; and there is not the least allusion to Admiral Ingram, or Mrs. Roberts, when the appointment of the executors is discussed.—The court therefore must consider No. 4. as abandoned.

On the morning of the next day the deceased sent a note to Mr. Russell, expressly desiring him to come and make his will. About one o'clock he received a note from Mr. Russell stating that he could not come that day, but that he would be with him on the following morning.

Mr. Gill, who as well as Mrs. Roberts was with the deceased when this answer arrived, says the deceased was very uneasy when he found Mr. Russell could not come, and at the delay which would be thereby occasioned in the settlement of his affairs; and said he wished to have them settled, while Mrs. Roberts was with him for that purpose. And the deceased then said that the deponent should write down instructions for Mr. Giles Russell to make his will by; and then, addressing himself

to the deponent, said to him, "Mr. Gill, you must write;" or words to that effect. And the deponent having then drawn the table, on which were pens, ink, and paper, near the foot of the bed, the deceased proceeded to give in the presence and hearing of this deponent instructions for his will by word of mouth to the said Mrs. Fanny Roberts from a paper which he held in his hand; and she the said Mrs. Roberts, as the deceased gave the said instructions, repeated the same to the deponent, who in the like order in which the said instructions were so given by the deceased and repeated by the said Mrs. Roberts, took the same down in writing. That he does not now remember the said Mrs. Roberts having at the time deposed of asked the said deceased who was to be his executor, and the deceased answering that Captain Lawrence should be executor, or executor in trust as articulate; but he is quite certain that at the time he was in manner hereinbefore described told or instructed to write down or insert the legacy of five hundred pounds to Captain Lawrence, he was at the same time told or instructed that the said Captain Lawrence was to be the executor in trust of the deceased's said intended will, as well by the deceased saying so in the deponent's presence and hearing, as by the said Mrs. Roberts repeating the same to the deponent; and he therefore wrote a memorandum to that effect in the same line, containing the said intended legacy of 500*l.* to Captain Lawrence. And he saith that he was interrupted in the writing the instructions by going to dinner with the said Mrs. Roberts, and by several gentlemen calling to enquire after the deceased: but the said Mrs. Roberts and the deponent went up again to the said deceased in his bed-room after dinner, and after the said gentlemen had left the house, to finish the writing the instructions for the deceased's will, which were proceeded with and finished by the deponent; and, when he had finished them, he read them all over to the deceased in the presence of Mrs. Roberts, who expressed his full approbation of the same, and said it would do very well."

The account thus given by Mr. Gill is in its general substance confirmed by Mrs. Roberts, as far as she was present; and there is no reason to doubt the truth and correctness of this relation, or the full testamentary capacity of the deceased; for though he was agitated, hurried, and irritated, he perfectly well knew what he was about, and dictated these long instructions:—it is impossible then to doubt that this paper, as far as it goes, contains the last intentions of the deceased,—or that when he dictated these legacies he intended the several persons named to take benefit to this extent:—he confirmed these intentions by signing his name, which he was most anxious to do; he was fearful that he should not live to complete the act.—It is true the deceased did not intend this paper to be his will,—because he hoped to live to make a complete disposition of his property by Russell's assistance: but the act of God intervenes, and the will is prevented by the deceased's death from being drawn and completed.—To contend that this paper cannot operate at all, and is not to have effect as far as it goes, would be to bring into discussion first principles, and to contend against the uniform decisions of this Court as far as its records are preserved and handed down to us.

The question is, whether it is to operate solely—and secondly, if not solely, in conjunction with which will? whether that of 1804, or that of 1806?

The Court is of opinion that it is not to operate solely;—because it

was evidently his intention to have given further instructions; the instructions were incomplete. According to Fanny Roberts, the deceased only directed some things to be written down,—her impression was that he meant to give further instructions on the next morning;—there are memorandums for enquiries to be made;—there are no directions respecting the residue—nor whether the legacies were to be diminished or increased in case the property should be too little, or too much:—there are no directions for the disposal of his real property, though it is obvious that he intended to render it subservient to the payment of his legacies;—he was a good deal hurried also; and might overlook many persons, even with the assistance of the papers. There are persons benefitted by the will of 1804, whom there is no reason to think he would pass over. In short, there is abundant reason to conclude, that though he signed this paper, it was not as a complete disposition of his property; but to give effect to it as far as it went.

Instructions of this sort, so far as respects the question, whether they are to operate as an entire revocation of a former will, or to be taken in conjunction with it, are very different from the case in which they are finished and delivered over to the drawer of the will, merely to prepare an instrument from them.—It is a rule of the court that unfinished instructions, where there is a complete will, only revoke the complete will as far as they go;—they are not a codicil to be taken in addition to the will: but revocative as far as they go, and to be taken in conjunction with the will.—The two instruments are to be taken as *containing together* the will of the deceased. If this principle was rightly understood in other courts, there would seldom be much question about cumulative legacies;—for where a paper is codicillary, and two legacies are given to the same person, they are cumulative. Where instructions are pronounced for, *as containing together* a will, that is, where there is a complete will, and an instrument intended as the inception of a new will, but not completed, the latter legacy supersedes and revokes the former, and is substituted in the place of it. For these reasons the deceased, here intending an entire new will, and not having completed it, but having proceeded a certain length, I am of opinion that this paper cannot take effect alone, nor as a codicil: but must be pronounced for *together with* a former will.

The question then comes to this, which is the former will? There is no reference in the instructions to Admiral Ingram or Mrs. Roberts,—he did not intend that they should have the disposition of his fortune, because he has disposed of it himself; the inference is that the deceased had wholly abandoned the conditional will, when he set about to make a new will. There is strong evidence, I think, that the deceased considered the will of 1804 as his operative will at that time, from what he said to Mr. Marsh on the 27th of July. He had been conversing with him for some time respecting the disposition of his property among his relations; and he says, that “he had spoken to the deceased under the impression that he had no other will than that which Admiral Ingram had spoken of at the time hereinbefore deposed of: but the deceased at this period of the conversation said, ‘I have a will by me;’ and, taking up a folded paper in his hand from off the bed in which he lay, consisting apparently of more than one sheet of paper, said, ‘*Here it is; if I die, I shall not die without a will; but I want to alter some*

things in it, as some matters have occurred since which I wish to provide for.'

This must have referred to the will of 1804. He had not Admiral Ingram's will in his possession: the will of 1804 was in his possession; it did consist of several sheets of paper; it was uncanceled;—his declaration to Betty Bishop is to the same effect, when he told her after Admiral Ingram and Captain Lawrence had left him on the 26th of July, "I don't know what they see in me, that they are so anxious about my making my will." To which she answered, "It is nothing but right, Sir; you should keep a will by you; you be'ent dead never the sooner, and I hope there is no likelihood of death now." To which he replied, "I have got a will, Betty; but I wish to make some alterations upon the account of my poor relations."

This can only be construed as applying to the will of 1804. The term alteration would not apply to the will of 1806:—the evidence of Gill to the other interrogatory agrees with this.

Here is a direct reference to the will of 1804, and the codicil. A recognition of it, as the will which by this paper he wished to alter in favour of his poor relations. These considerations lead to the conclusion that he considered the will of 1804 as his subsisting will.

The remaining important point is whether the condition of 1806 is satisfied? The condition in itself as applied to a whole will is extraordinary. It does not depend upon any particular event, as in case he should fall in action or the like, nor upon any event in his lifetime; but upon the conduct of some one out of a great number of persons after his death; and the peculiarity is, that it is not to affect the interests of that individual, but the validity and effect of the whole will. As far as my observation goes, no case of this sort has ever occurred. Where a condition is to prevent parties from asserting their legal rights, the law does not favour them, even though they affect the individual only who breaks the condition. When a legacy is given on condition that the legatee shall not litigate the will, the cases cited by the counsel of litigation, where there has been *probabilis causa*, show that it has been decided to mean only vexatious litigations. Here the person would not only forfeit his own rights, but those of many other persons;—at the least, the case would require such a condition to be completely and absolutely satisfied. What has been done here? and how have these relations disputed it? Caveats have been entered;—these might be for the purpose of protecting the will of 1804, instead of disputing it;—but it is said, the proctor on the other side declared he opposed all the papers;—but this he retracted the next court; it was made in error, and in doing it he exceeded his proxy;—the court cannot consider this act as such a disputing of the will of 1804 as satisfied the condition of the will of 1806, and destroyed the rights of all the legatees under the former will.

Upon the whole, I am of opinion that No. 5, as far as it goes, must be carried into effect. That paper, however, is only revocatory pro tanto, and only to be taken in conjunction with the former will. I am of opinion also, that the will of 1804, with its codicils, is to be considered as the former will with which No. 5 is to be taken in conjunction.

I pronounce, therefore, for the will and codicils propounded by Mr. Strong and Mr. Roberts, and for paper No. 5, propounded by Captain

Lawrence, as together containing the will of the deceased; and, as Capt. Lawrence is dead, I decree the probate to Mr. Strong and Mr. Roberts.

ATKINSON v. Lady ANNE BARNARD.—p. 316.

Residuary legatees, even where there is no prospect of any residue, entitled to an administration de bonis, in preference to legatees and annuitants.

JUDGMENT.

Sir JOHN NICHOLL.

This is a question respecting the grant of an administration de bonis of Richard Atkinson:—he died in 1785, having made a will, in which he nominated four executors. Probate was taken by all of them—they are all since dead; and Mr. Muir the surviving executor died intestate, having left goods unadministered. The deceased also appointed several residuary legatees—eight or nine. One of them Mrs. Jane Atkinson now applies for an administration de bonis; and in the ordinary course she would be entitled: but the grant of it is opposed by Lady Anne Barnard and Mr. Michael Atkinson, who are not residuary legatees, but who are legatees and annuitants. Various circumstances have been gone into, to show that the estate would be more properly administered by these legatees than by the residuary legatee. It is said the Court has a discretionary power on this subject; and certainly the first thing here is to show that the Court has exercised a discretionary choice in such a case.

Between the widow and a next of kin there are many instances where the Court has set aside the widow, though the ordinary generally gives it the widow. So also between different next of kin and between several residuary legatees, where the parties stand upon an equality of right, the Court frequently exercises a discretion. But is there any case in which a residuary legatee has been set aside in favour of a mere legatee? If there is no precedent, I should be unwilling to make one, unless under very extraordinary circumstances.

What is there here to induce me to take this novel step? What are the special grounds set forth? It is said the estate is insufficient; that there is no residue, and consequently that the residuary legatee can have no interest. If this ground is sufficient, the door will be opened to perpetual applications, and endless litigation, which will bring with it great inconvenience from the delay which must arise in the grant of administrations. The residuary legatee is the testator's choice; he is the next person in his election to the executors. The practice goes along with that preference. The case of *Thomas v. Butler*, 1 Ventris, 217, is a strong confirmation of the modern rule. But in the present case this ground is done away by another consideration: here the residuary legatees are legatees also and annuitants under the will; it is impossible to say they have no interest in making the best of the estate;—it happens also that there are eight other annuitants and legatees;—who also are residuary legatees, and entitled to a preference over the mere legatee,—they do not resist the grant to Mrs. Jane Atkinson;—but Mr. Clayton is confided in by them;—and I cannot but consider that by not appearing they concur in the appointment to Mrs. Jane Atkinson.

It is objected that Mrs. Jane Atkinson resides at a distance, and is a spinster: but really these objections are ludicrous.

Another objection made is that the executors have misconducted themselves; that they have not paid the legacies, and that they have done this by the advice and under the management of Mr. Clayton their solicitor, and that Mr. Clayton is intended to be employed by Mrs. Jane Atkinson,—he also is a mortgagee in possession of certain estates at Jamaica, and the brother-in-law of George Atkinson, one of the executors who was acting trustee and executor under his guidance and direction; and that he never for twenty years made any settlement of his accounts. If the Court had any choice, how could it be expected to govern itself by such collateral considerations? If the mal-administration of the executors is any ground, and the fact is denied, before the Court can give credit to it, it must enter into an investigation and examination of all the parts of the transaction; and the Court must do this in common justice before it affixes a stigma on the conduct and memories of the executor:—this cannot be the province of this Court,—in an attempt so novel, which would go to set aside a residuary legatee who has not acted in unity or conjunction with either of the executors. Supposing however that Mr. Clayton will in effect have the management of the property, as may possibly be the case; certainly before I set aside Mrs. Jane Atkinson on that ground, and put the administration into another channel, I should be bound in justice to go into an examination of this whole transaction;—and a suit in this Court merely to decide who is to administer would become as long as a suit in Chancery to settle all the intricate concerns of this estate. These accounts and intricate concerns can only be adjusted in a Court of Equity,—indeed there they now are, and only wait till there is a representation which has been hitherto delayed by an opposition to the usual course of practice in this Court.

Lady Anne Barnard and Mr. Michael Atkinson, as legatees and annuitants, must have the means of calling Mr. Clayton to an account, without being possessed of the administration. The Court of Chancery is alone competent to settle this,—it is said this could be done more advantageously by the administrator; if so, it would be more disadvantageous to the other party, and this would depend on the question of mal-administration.

I see no ground for this step;—Mrs. Jane Atkinson is entitled to this administration; if she employ an improper solicitor, she is accountable for it. I cannot presume that she will not do her duty: I cannot supersede her right. She is entitled to it by the uniform practice of the court; and to her I shall grant it.

Costs being prayed.

Per Curiam.

The court certainly does not wish to countenance experiments against the usual practice—but I rather wish the parties would not press for costs in the present instance; it is a complicated property, and of great magnitude.

ARCHES COURT OF CANTERBURY.

BAYARD, falsely called MORPHEW v. MORPHEW.—p. 321.

Nullity of marriage, by reason of a former marriage, established.

PREROGATIVE COURT OF CANTERBURY.

SUTTON v. DRAX.—p. 323.

A legatee entitled to have his expenses paid, when he establishes a paper.

PASKE v. OLLAT.—p. 323.

Where a legatee is the writer of his own legacy, more than ordinary proof of the authenticity of the will is called for.

JUDGMENT.

SIR JOHN NICHOLL.

There is no difficulty whatever in the decision of this case; but a feature occurs in it of a nature that I cannot pass over without notice. The writer of the will, who was the deceased's attorney, is himself benefited under it to a considerable amount. The Court is always extremely jealous of a circumstance of this nature. By the Roman Law, Dig. lib. 34. s. 8, Qui se scripsit hæredem could take no benefit under a will. By the law of England this is not the case: but the law of England requires, in all instances of the sort, that the proof should be clear and decisive;—the balance must not be left in equilibrio; the proof must go not merely to the act of signing, but to the knowledge of the contents of the paper. In ordinary cases this is not necessary; but where the person who prepares the instrument, and conducts the execution of it, is himself an interested person, his conduct must be watched as that of an interested person:—propriety and delicacy would infer that he should not conduct the transaction; and à fortiori in a case where he is the confidential attorney of the deceased;—and where the benefit conferred is to a considerable amount.

The presumption and onus probandi are against the instrument: but as the law does not render such an act invalid, the Court has only to require strict proof:—and the onus of proof may be increased by circumstances; such as, unbounded confidence in the drawer of the will;—extreme debility in the testator;—clandestinity;—and other circumstances which may increase the presumption even so much as to be conclusive against the instrument. In the absence, however, of any circumstances of this sort, the demands of law may be more easily satisfied.

These are the principles and rules handed down to me by my predecessors, and, though I have no difficulty as to the proof in this case,—yet the feature is of a sort that I was unwilling to pass over without notice. The execution here is attested by two witnesses, and a solici-

tor, who all depose without the slightest hesitation as to capacity—there is no concealment whatever:—Mr. Golding openly before the witnesses refused to attest the will, because he was benefitted under it. Every possible degree of caution was observed: the sister of Mr. Golding has also been examined;—she proves a complete case, that she heard the instructions, that they originated with the deceased, and were a surprise upon the drawer of the will;—that he proposed another solicitor; but the deceased refused to attend to this suggestion. A very careful reading over is proved.

Upon the whole of this case I have not the least doubt whatever of the perfect capacity and free-agency of the deceased; and I am bound, therefore, to pronounce for this will.

LANGMEAD v. LEWIS.—p. 325.

Papers which may be of a testamentary nature not to be withheld from the court.

An application was made to the Court to direct a monition against an attorney who refused to deliver a paper which was in his possession, and which it was supposed might be of a testamentary nature.

This was objected to on the ground that it was a paper which had never been seen by the deceased.

Per Curiam.

There is a possibility nevertheless that the paper may be of a testamentary nature; it may contain instructions drawn up in the lifetime of the deceased,—it must be produced.

The monition was decreed.

CONSISTORY COURT OF LONDON.

DRONEY, falsely called ARCHER, v. ARCHER.—p. 327.

The marriage of an illegitimate minor, without the consent of a guardian appointed by the High Court of Chancery, annulled.

PREROGATIVE COURT OF CANTERBURY.

RYAN v. RYAN.—p. 332.

Administration granted to a second wife, the first having been divorced à vinculo by a royal ordinance in Denmark, the parties divorced being both Danish subjects.

PHILIP RYAN, an Irishman by birth but for many years domiciled in Denmark, and a resident in the city of Copenhagen, died in London in June, 1808, leaving a widow and an infant daughter by her, and three daughters the offspring of a former marriage.

It appeared, that on the 3rd of September, 1803, he had entered into

a contract of separation with his first wife; and that on the 25th of March, 1807, his marriage was entirely dissolved, and permission given to the parties to marry again by an ordinance under the hand and seal of his Danish Majesty. On the 5th of June following he executed a contract of marriage with Elizabeth Ferrall a native of St. Croix, and the daughter of an Irish physician domiciled at Copenhagen. This contract was subject to the confirmation which it afterwards received of the king of Denmark: and the marriage was subsequently had under the authority of a royal licence dispensing with the publication of banns, and the solemnization of it in a church.

Philip Ryan died intestate, (at least an instrument of a testamentary nature which he left behind him was admitted to be invalid,) and shortly after his death, *viz.* on 28th June, 1808, the person to whom he was last married applied to the Prerogative Court of Canterbury in the character of his lawful widow and relict for letters of administration to his goods, chattels, &c. The three daughters of the former marriage, who were minors, appeared by James Ryan their uncle and guardian, and denied the interest of the widow.

The proceedings in the cause were delayed; first, by the war which broke out between Great Britain and Denmark, and afterwards by the absence of some of the parties beyond sea.

Adams and Lushington for Mrs. Ryan.

No counsel appeared on the other side.

JUDGMENT.

SIR JOHN NICHOLL.

I think this Court ought not to make any further difficulties in a case in which the widow and children of the deceased are parties;—the interest of the widow was denied—she has propounded it, and I think established it according to the law of Denmark;—though there was a former marriage, it appears by the evidence of the Danish lawyers, that a divorce by the king of Denmark is a divorce à vinculo matrimonii,—and that such a dissolution of an existing marriage, is good.

Under the circumstances of this case I think the proofs sufficient, the parties being both domiciled in Denmark, and both contracted in that country—whether they would have been sufficient in a matrimonial cause it is not necessary to decide; but on the mere question whether the widow shall take out the administration, *semper præsumitur pro matrimonio*;—The parties, who opposed the widow at first, have now withdrawn their opposition. I pronounce for her interest, guarding myself against its operating in the same way in a matrimonial cause, where both the burthen and the nature of the proof is different—with these cautions and limitations I pronounce for the interest of the widow.

ARCHES COURT OF CANTERBURY.

CLARKE and CLARKE v. DOUCE and EAGLETON:—p. 335.

A suit for a legacy brought by legatees against an executor. The demand not substantiated.

AGG v. DAVIES, falsely calling herself AGG.—p. 341.

Nullity of marriage on account of the minority of the wife, not established.

PREROGATIVE COURT OF CANTERBURY.

SIKES and BRODERICK v. SNAITH.—p. 351.

An allegation propounding instructions committed to writing during lifetime of the testator, but neither seen by him nor read over to him, admitted to proof. Instructions committed to writing during the lifetime of the testator, but never seen by him, nor read to him, established as a will.

On the 14th of February, 1816, Westgarth Snaith, Esq., a banker in Mansion House Street, being very ill, sent for Mr. Walton, his solicitor, into his bed-room, and gave him detailed instructions for making his will. Mr. Walton retired into another room, where Mr. Joshua Watson, Mr. Snaith's brother-in-law, was; and immediately, in his presence, committed to writing the heads or substance of the instructions which he had received, and then proceeded to draw up a will from them;—when he had finished it, he desired Mr. Watson to inform Mr. Snaith that the will was ready for execution, and to ask whom he would have for witnesses besides himself. This message being communicated to Mr. Snaith, he desired that two of the clerks in his banking house, whom he named, should be called up for that purpose. They were accordingly sent for;—and Mr. Walton returned to the bed-room of Mr. Snaith with the intention of reading over the will to him, and seeing it signed and executed;—when he learnt that the testator had been seized with a violent fit of vomiting, which had reduced him to so languid and insensible a state as to render him incapable of executing his will, or of doing any rational act. In this state Mr. Snaith continued till his death, which happened within a very few hours from that time.

The will drawn up by Mr. Walton was as follows:—

“This is the last will and testament of me Westgarth Snaith, of Mansion-house street, London, banker. I give and bequeath to my dear wife Jane Snaith, for her own use and benefit, my carriage, carriage-horses, and harness; and also, all the plate, linen, china, books, liquors, (except wines,) and spirits, in either of my houses in Mansion-house street, or Woodhouse, in the parish of Wanstead, Essex; Together with the use, free of taxes and outgoings, for the period of two years from my decease, of my freehold and copyhold house, lands, and premises at Wanstead aforesaid, (our residence,) with the use of the live and dead stock there. And after the expiration of such two years, the same to be sold by my executors and trustees, and the net produce carried to the account of the residuum of my estate and effects. I give and bequeath to my nephew, Mr. Thomas Wilkinson, all the household goods and furniture in my house in Mansion-house street. I give and bequeath to my esteemed relatives and friends, Joshua Watson, of Clapton, in the parish of Hackney, Esquire, the Reverend Thomas Sikes, of Guilsboro', in the county of Northampton, and William Brodrick, of Gower street, in

the county of Middlesex, Esquire, the sum of three hundred pounds sterling each of them. And I do hereby nominate and appoint them executors of this my will, and trustees for the purposes hereinafter mentioned. And as to all the rest and residue of my estate and effects whatsoever, whether freehold, copyhold, or personal, I give, devise, and bequeath the same unto my said executors, the said Joshua Watson, Thomas Sikes, and William Brodrick, their heirs, executors, administrators, and assigns, In trust, to sell, dispose, collect, and receive, and to invest the net proceeds thereof in their names, upon government stocks and funds, and to pay the income and produce of one full third part of such my residuary estate to my said wife during her life. And to pay, transfer, and divide the principal thereof after the decease of my said wife to and equally between such of my children as shall live to attain the age of twenty-one years; and the executors or administrators of such of them as shall live to attain that age, and die in the lifetime of their mother. And as to the remaining two third-parts of such my residuary estate, In trust to pay, transfer, and divide the same to and equally between such of my children as shall live to attain the age of twenty-one years, on their respectively attaining that age; and during such their minorities respectively, to pay to my said wife the *income* and *produce* of each child's share, she continuing to maintain and educate them. And in case of her decease during any child's minority, In trust, to pay and apply the income and produce of each minor child's share, or a competent part thereof, at the discretion of my said executors and trustees, for or towards her maintenance, board, and education; and to invest the surplus, if any, of such income and produce, to accumulate for her use till she attains the age of twenty-one years. In witness whereof I have hereunto set my hand and seal this fourteenth day of February, One thousand eight hundred and sixteen.

L. S.

"Signed, sealed, published, and declared by the said testator Westgarth Snaith, as and for his last will and testament, in the presence of us, who in his presence, at his request, and in the presence of each other, have subscribed our names as witnesses, the several interlineations and obliterations, opposite to which the initials of our names are set, being first made."

This paper was propounded in an allegation by the executors, and opposed by the widow of the deceased.

Jenner and *Dodson* for the will propounded.

Swabey and *Daubeny* contra.

JUDGMENT.

Sir JOHN NICHOLL.

On the point of law that a paper can be pronounced for which had never been seen by the deceased, or read over to him, I have no doubt: this principle was recognized in the case of *Wood v. Wood*, Mich. T. 1811, ante, 101; in which all the necessary instructions having been given by the deceased, and reduced into writing in his lifetime, probate was given of so much of the paper as was shown by evidence to be exactly conformable to the instructions. It is essential that it should be written in the lifetime; otherwise it would be a mere nuncupative will, and then of no effect under the statute. It has been argued that there are here mere heads of instructions committed to writing, and

that neither will nor instructions have been read over to the deceased. I do not apprehend that the law requires either one or the other. The doctrine of this Court was laid down in *Bury v. Bury*, Prerog. Hilary Term, 1791, where instructions were established on satisfactory proof that they had been reduced into writing during the life of the deceased. In *Box v. Wetherby*, Prerog. 1804, the Court said, "*reading over was only required to show that the paper was conformable to instructions. Here the evidence leaves no doubt as to the intentions.*"

In this case the drawer of the paper, from his sending to the deceased to know who were to be the witnesses, must have been satisfied that he had received his final instructions;—two of the clerks out of the banking house were directed to be called up;—the deceased, before they came, was seized with a fit of vomiting, from which he did not recover, and died within three hours.

This is a proper plea to go to proof in order to see how far the paper is drawn up in conformity with the instructions: it will then become a question of fact whether the will is made according to the directions given.

The cause came on for hearing the evidence adduced in support of the allegation.

JUDGMENT.

Sir JOHN NICHOLL.

The law was fully discussed on the admission of the allegation. I referred, on that occasion, to several cases. I have since taken an opportunity of looking into them; and I find a series of cases from *Gardner v. Smith* in 1727, in which the principle has been established that a paper, not written in the presence of, nor read over to, or by the testator, may yet be established upon clear proof, that it was written in his lifetime, and was drawn up conformably to his instructions, the further completion being prevented by the intervention of incapacity;—at the same time that the rule of law is clear, it is the duty of the Court to look cautiously into proof of the facts to ascertain that the paper was actually written in the lifetime of the party, and that it was drawn up by his directions.—Now, therefore, I have only to enquire into the mere question of fact whether it is conformable to the intentions of the deceased. There is no doubt but that it was drawn up in his lifetime;—no doubt of his capacity;—no doubt of his volition;—none of the general outline of his intention. The only doubt suggested is, whether there are not some minute and subordinate parts of the will not according to any directions. But if this were so, the Court would direct them to be struck out as not proved;—from the evidence, however, there can be no doubt whatever as to those parts.

The deceased was dangerously ill; his apothecary advised him to settle his affairs; Mr. Watson, his brother-in-law, gave him the same advice. His solicitor was sent for, and left alone with him; and instructions were given him for drawing the will. The subordinate parts, on which doubts were expressed on the admission of the allegation, are very fully explained by the evidence, especially in the answers to the interrogatories. Short memoranda or heads of the instructions were first taken down by the solicitor, and afterwards a will was drawn from

them in a more formal shape. The will is merely an arrangement of his property between his widow and daughters; something different from what the law would have made, and suitable to the condition of all parties.

The conduct of the party at the time is a strong corroboration of his impression. Mr. Walton was actually proceeding into the room to have the will signed, when the deceased was seized with a vomiting fit, and never afterwards had capacity to complete it. If the deceased had doubted whether the attorney had completed his wishes, he would have asked questions to that effect: but he was quite prepared and ready to sign the instrument as soon as it could be brought to him. Nothing but the sudden seizure, or, as we term it, the act of God, prevented the execution: if the Court refused to pronounce for this will, it would defeat the final intentions of the deceased. Adhering, as I do, to the rule laid down in all the cases, that the Court must proceed with great caution, I have still no hesitation in pronouncing for the paper.

ARCHES COURT OF CANTERBURY.

The Office of the Judge promoted by BLACKMORE and THORPE
v. BRIDER.—p. 359. *7 E.C.R. 187.*

An incestuous marriage annulled, and penance enjoined the parties to it.

PREROGATIVE COURT OF CANTERBURY.

GRIFFITHS and TRINDER v. BENNETT and TAYLOR.—p. 364.

Executrixes pronounced contumacious for not bringing in an inventory.

HANNAH BENNETT and Elizabeth Taylor, the daughters and two of the residuary legatees of William Jones, instituted proceedings against their sisters, Mary Griffiths and Anne Trinder, the executrixes of their father's will, for an inventory.

The probate of the will had passed in August, 1815, and the inventory had been assigned since the first session of Hilary Term, 1816; and, not being brought in, an application was made to pronounce Hannah Bennett and Elizabeth Taylor contumacious.

Per Curiam.

Parties must not hang back in cases of this description. I pronounce the executrixes contumacious.

CONSISTORY COURT OF LONDON.

MEDDOWCROFT v. GREGORY; falsely called MEDDOWCROFT.
p. 365.

The marriage of a minor annulled on account of an undue publication of banns.

ARCHES COURT OF CANTERBURY.

CLUTTON and WALLER v. CHERRY.—p. 373.

Not necessary in all cases that notice should be given of the specific purpose for which a parish vestry is convened.

CONSISTORY COURT OF LONDON.

LEITH v. CLIFF.—p. 389.

In answer to a libel in a suit for subtraction of tithes it is not sufficient to state deductions generally; they must be specifically set forth.

ARCHES COURT OF CANTERBURY.

BURNELL v. JENKINS.—p. 391.

A rector held not to have been let, in the sense of the 2 and 3 Ed. 2. in the carrying away his tithes. Sentence of the Court of Llandaff reversed.

PECULIARS' COURT OF CANTERBURY.

DUNN v. DUNN.—p. 403.

Adultery proved in a suit for a separation à mensa et toro, but the conduct of the husband such, as to bar him from a sentence in his favour.

JOHN WILLIAM DUNN instituted a suit against Eliza Papps Dunn, his wife, for a divorce à mensa et toro, by reason of adultery. It appeared that Mrs. Dunn eloped from her husband in October, 1815, with Mr. Knightley Musgrave Clay;—that she was brought back by her mother, and reconciled to her husband on the 1st of November following; and that on the 4th of December in the same year she again eloped with Mr. Clay. There was sufficient proof of the adultery: but the point made in the case was, that Mr. Dunn, by his negligence and connivance, had barred himself from any title to the remedy he claimed. Mr. Clay, who had been an officer in the same regiment (the 9th Dragoons) with Mr. Dunn, had been in habits of intimacy with him before his marriage, and after that event visited frequently at his house.

The fifth and sixth articles of the libel pleaded, "*That on or about the 16th day of October, in the said year, 1815, the said John William Dunn went to London, accompanied by his wife, the said Eliza Papps Dunn, to the house of his father, Mr. John Dunn; and soon after their arrival there the said Eliza Papps Dunn, in the absence of her said husband, quitted the said house in a hackney coach, and*

did not return there. That the said John William Dunn being greatly surprised and alarmed at the sudden disappearance of his said wife, made the most diligent search and enquiry for her, and at length found she had left London, but was unable to discover to what place she had gone. That in the beginning of the month of November following, Dorothy Ann Papps, the mother of the said Eliza Papps Dunn, having received intelligence that the said Eliza Papps Dunn was residing at St. Omer's, in France, under an assumed name, proceeded thither, where she found the said Eliza Papps Dunn, and the said Knightley Musgrave Clay, living and cohabiting together as man and wife, and passing by the names of Mr. and Mrs. Brown. That they the said Knightley Musgrave Clay and Eliza Papps Dunn, during the time they so lived together as aforesaid, frequently slept in one and the same bed, whereby she the said Eliza Papps Dunn committed the crime of adultery. That the elopement of the said Eliza Papps Dunn, as before pleaded, was represented to the said John William Dunn, and especially by the said Dorothy Ann Papps, not to have arisen from any criminal connexion, but to have been occasioned by other circumstances. That the said John William Dunn, being deceived by such false representations, did, upon the entreaty of the said Dorothy Ann Papps, consent to meet her and the said Eliza Papps Dunn on their landing at Dover from France, and accordingly met them there, on or about the 1st day of November, 1815. That upon such meeting taking place the said John William Dunn, being entirely ignorant of the adulterous intercourse which had taken place as before pleaded, was induced, at the earnest entreaties of the said Dorothy Ann Papps and his said wife, (who made the strongest protestations of innocence as to any adulterous intercourse, and expressed great contrition for her misconduct in quitting her said husband,) to receive her back again; and they then returned to his aforesaid house, at Ham Common."

Dorothy Ann Papps, the mother of Mrs. Dunn, deposed, "That she was at the house of John William Dunn, Esq. at Ham Common, on the 16th of October, 1815;—that on the morning of that day John William Dunn and Eliza Papps Dunn left their house to visit Mr. John Dunn, his father, in Bedford-street, Covent Garden. About seven or eight o'clock the same evening J. W. Dunn returned, accompanied by his father, and informed the deponent that his wife had quitted his father's house to inquire the character of a servant, but had not returned by the time appointed for their leaving town; and that he had been to every house where she visited in London, but could not find her. He was greatly agitated, and intimated to the deponent his apprehensions that she was gone off with Knightley Musgrave Clay. The deponent having never before heard any suspicion of an improper attachment between her daughter Dunn and Knightley Musgrave Clay, could not believe that there was any foundation for these apprehensions, but thought that Eliza Papps Dunn must have been detained at some friend's house beyond the time of her returning home; and she therefore left Ham that evening and came to London in search of her, accompanied by Mr. Dunn. She called at the house of every friend where she thought it likely that her daughter might be found; but could not, nor could her husband gain any intelligence of her, until about a week or ten days af-

terwards, when a letter was received from her, addressed to Diana Andrews, the nursery-maid, who had charge of the children at Ham Common. The purport of it was to make inquiries about the children, and to desire Diana Andrews to write to her thereon, and it stated that the said Diana Andrews might ascertain how to direct her letter to her by inquiring at Mr. Mereweather's in Marlborough-street. She accordingly went to Mr. Mereweather's; and having understood that he was the friend of the said Mr. Clay, but a stranger to her daughter, the deponent asked him for Mr. Clay's address instead of for that of Mrs. Dunn. Mr. Mereweather informed her, that the only address he had by which to write to Mr. Clay, was that of '*Mr. Brown, St. Omer's, France,*' which he gave her on a piece of paper, but he did not say that Mr. Clay was passing under the name of Mr. Brown. The deponent communicated this address to Mr. Dunn, who, thinking it likely that some intelligence of his wife might be gained from Mr. Brown, requested the deponent to go to St. Omer's to him, which she consented to do, and immediately left town for that purpose. Mr. Dunn accompanied her to Dover, where he remained, and she proceeded alone to St. Omer's. She arrived there about five o'clock in the evening, and stopped at an hotel, the name of which she has forgotten. She inquired at the hotel for Mr. Brown, and a servant showed her to his lodgings. On inquiring for him there, the servant said he was at dinner;—but the deponent replied that she was a friend of his, and she followed the servant into the dinner-room, and found Mr. Clay and Eliza Papps Dunn at dinner together. The deponent reproached them with their conduct, called the said Knightley Musgrave Clay a villain, and asked her daughter how she could think of leaving her husband and children. In reply to which Mr. Clay assured her that he meant to act honourably towards Mrs. Dunn, by getting a divorce, and then marrying her;—and Mrs. Dunn said nothing, but burst into tears. The deponent insisted upon her daughter returning to England with her, which she agreed to do;—and accordingly left the room with the deponent to pack up her things for that purpose. Mr. Clay expressed his intention to leave his said lodgings likewise; and accordingly proceeded into the adjoining room, as he said, to pack up his effects. When they had finished packing up, they both accompanied the deponent to the hotel where she had first stopped; where, the gates of the town having been by that time shut, they remained that night. The deponent and her daughter slept together, and on the following morning went together in a post-chaise to Calais, to which place they were accompanied by Mr. Clay, who went alone in another post-chaise: but, on their arrival at Calais, they left him, and the deponent and her daughter went alone together to Dover. The deponent was so well pleased at getting her daughter to return with her to England that she did not ask her any questions as to the circumstances under which she was living at St. Omer's. When she left Dover for St. Omer's, Mr. Dunn said he would remain there until her return; but she did not then represent to him that the elopement of her daughter had not arisen from any criminal connexion, but had been occasioned by other circumstances as articulate, as she was at that time ignorant of the circumstances under which such elopement had taken place; nor was it in consequence of any such representations of the deponent that the said J. W. Dunn remained at Dover; but he did so of his own accord, and he requested the deponent to go to France alone;

and, if she succeeded in finding Mrs. Dunn, to return with her to him at Dover. The deponent and her daughter arrived at Dover on the 1st of November, 1815. As the boat in which they were approached the shore from the packet, she observed Mr. Dunn walking on the beach. The said Mrs. Dunn left the boat first, and immediately went up to her husband, and they walked away together. The deponent, with Major Grant, a friend of Mr. Dunn's, who happened to come to England in the same vessel, followed them to an inn at Dover, which she thinks is called The Ship, and arrived there about a quarter of an hour after they had entered the same together. On entering the inn they met Mr. Dunn alone in the passage; and after some general conversation Major Grant withdrew, and Mr. Dunn then said, '*I am perfectly satisfied with what Eliza has told me, and shall ask you no questions; it has made me very happy;*' or he expressed himself in words to that very effect, as near as the deponent, in the agitated state of mind in which she then was, can now recollect. The deponent is unable to depose, whether or not, upon this occasion, the said J. W. Dunn, was ignorant of any adulterous intercourse between his said wife and the aforesaid Knightley Musgrave Clay, or whether she made any protestations of her innocence thereof, and expressed great contrition for her misconduct in leaving her said husband; or whether it was in consequence of such protestations and contrition that he was induced to receive her back again as articulate; for, after expressing himself satisfied with his wife's explanation, the deponent thought it as unnecessary as unpleasant to touch upon such a subject;—but she says that she did not entreat him so to receive her back again; for, however grateful she might feel towards him for such an act, and however desirous that it should take place, she should not have thought herself warranted in attempting to accomplish it by any entreaties of her's; nor should she have wished it to take place, unless at his own spontaneous desire. The deponent, and Mr. Dunn and his wife, left Dover as soon after their arrival there as the horses could be got ready, and returned to the house of the latter at Ham Common."

Isabella Mary Dunn, (the sister of the husband,) swore, "That after the departure of Mr. Dunn and Mrs. Papps for France, she remained at his house at Ham Common for four or five days or a week; and about that time she received a letter from her brother to apprise her that he and his wife would be at home on the following day. The deponent had been previously desired by her father, in the event of Mrs. Dunn's returning home, to leave the house; and on receipt of the said letter she accordingly did so, and returned home to her father. She is, therefore, unable to depose what were the representations made to her brother on the subject of his wife's elopement by Mrs. Papps, or what were the protestations of innocence made to him by his wife, or what was the conduct adopted by him in consequence thereof, except that in the letter received by her, (the deponent,) he mentioned that *his wife was innocent*; and he afterwards assured the deponent that she was so; but in what terms she cannot now recollect, as the deponent said very little to him on the subject, and wished, from its unpleasantness, to drive it from her mind as well as from his as much as possible. She has since burnt the letter received from her brother: but she thinks she can recollect the contents, as they were very short. They were, '*Dear Isabella, I have*

found her, and she is innocent: we shall be home to-morrow. Your's affectionately, J. W. Dunn; or to that effect."

Lushington and Meyrick for Mr. Dunn.

Swabey and Jenner contra.

JUDGMENT.

SIR JOHN NICHOLL.

The marriage took place on May 15, 1813: the parties cohabited at different places, and had two children. The husband was an officer in the army: he had an intimate friend Mr. Clay, an officer in the same regiment, who resided with his mother at Ham Common. The adultery is charged with him; and it is fully proved. Mrs. Dunn twice eloped with him.

But the material point is whether the husband is entitled to relief under the circumstances stated in the evidence. Adultery forgiven is no ground of separation—condonation bars sentence; but not necessarily where there is subsequent adultery, though it will induce the Court to look with particular jealousy into the case; for if the adultery is forgiven with such extreme facility as to show no sense of injury, and no care is taken to prevent it from happening again, then the husband has no ground of complaint, for he has encouraged the adultery by his conduct; *volenti non fit injuria*; and Courts allowing such facility, instead of being the guardians of morality encourage corruption. On 16th Oct. 1815, the husband and wife went to town; she goes out on some pretence, and does not return;—he goes back to Ham Common. It does not appear that he had then known of the adultery; but he intimated his apprehensions that his wife had gone off with Clay. Something, therefore, must have happened which he had observed to lead his mind to this suspicion. A week or ten days afterwards the nurse receives a letter from her, telling her how she might learn where to address her by inquiring at a place named in London. The mother goes;—finds the person mentioned, whose name was Mereweather. She asks for the address, not of Mrs. Dunn, but of Clay; it is given to *Mr. Brown, at St. Omer's*. She communicates this to the husband. He desires her to go to St. Omer's;—she goes;—he goes to Dover, and waits there;—the mother finds her daughter living with Clay;—they then come to Calais;—Clay remains there;—the mother and daughter return;—the husband receives her at Dover;—he could not but know that she had been living in adultery with Clay. The mother says when she left the husband at Dover he said he would remain there, of his own accord, not at any suggestion of hers; he desired her to go, and if she found his wife to bring her to Dover. As the boat approached the shore, they saw him walking on the beach. The wife left the boat, went to the husband, and they walked away together: the mother and Major Grant followed them to the Ship Inn;—they came a quarter of an hour after them;—they met the husband in the passage;—he addressed her, and said I am perfectly satisfied with what Eliza has told me;—I shall ask you no questions;—it has made me very happy. The mother does not know whether he was ignorant of the adultery, or that the wife made protestations of her innocence: for, after his professing himself satisfied, she thought it unnecessary to touch on the subject. The mother did not intreat him to receive his wife. She should not have thought herself justified in using her endeavours for that purpose, if it had not been his own spontaneous desire. Major Grant saw the mother and daughter

with Clay at Calais; came with the mother and daughter. The husband was walking in agitation on the shore; his wife went to him, and they walked off together.

Here the husband is not receiving entreaties, contrition, or explanation; but his conduct is that of a husband affectionately receiving a virtuous wife;—such would show agitation when she approached; there is no mark of a husband sensible of injury. He asks no question of the mother, says not only that he is satisfied, but that he is made happy: there must have been some new arrangement mentioned to him which caused this. It has been pleaded that the mother having received intelligence, went to St. Omer's, and found her daughter and Clay cohabiting as Mr. and Mrs. Brown, as if it was a discovery of the mother's, whereas it appears that he was told the way to find her was, to address Clay as Mr. Brown, at St. Omer's;—*that he was deceived by false representations, and on the entreaty of the mother received her.* This is all false. *That he was entirely ignorant of the adultery,* though he knew she had eloped with Clay, had suspected her before; and she was found living with him. *That she protested her innocence, and entreated him to receive her.* If this had been proved, condonation under such circumstances would not bar subsequent adultery;—but none of these allegations are proved.

The very circumstance of setting up a false case before the Court warrants every suspicion;—there is no trace of any contrition;—of any injunction of the husband's in the way of caution against renewing the correspondence with Clay. He suggests and writes to his sister that she is innocent; it is impossible he could have believed her innocent; his sister did not; his father did not, for he required the sister to quit the house when she returned. Three days afterwards she told the servants she had been living at St. Omer's with Clay;—she did not pretend innocence;—she tells this, as it should appear, without any inducement. Clay returned to London;—it does not appear what caution was used, except that her mother was living there;—there must have been a communication and a plan laid;—within five weeks Clay comes with a chaise to the neighbourhood, and they go off again;—there is something clandestine, but it must be to deceive the mother;—nothing appears that the husband did; he might be furthering the plan and giving it all facility. They go off, intending to go to Scotland by water, then by land;—they go to Lincoln, she scarcely conceals herself;—she goes to Birmingham where her husband had gone on military service;—comes to London;—writes letters. It does not appear that she had any interview with her husband, rather the contrary. She states that his father would throw her off if he took her again, not showing any great apprehension of her husband.

There was a suit at common law, but no defence;—no suit here for nearly six months;—yet no appearance of any difficulty in finding her;—no defence to the suit except by the counsel stating as honourable men the difficulties which arise;—the suit may be collusion.

The mother says her daughter told her at St. Omer's she would get a divorce, and Clay would marry her;—it is not proved that this plan was communicated to the husband, and was *what made him happy*; but it renders the Court more jealous; whether this led to the intended journey to Scotland to get a divorce more easily;—to the suit without defence. All this makes the Court jealous lest it should be made a party

to a plan of the parties to get a divorce to marry the adulterer. But I do not decide on this ground but on the total failure of proof of the fifth and sixth articles, pleading the husband's ignorance of the adultery, the contrition of the wife, and the inducements used to persuade him to receive her.

On the whole I am so little satisfied;—and the husband comes before the Court so little entitled to cast off his wife, that I shall leave him to the superior Court for his remedy,—pronounce that he has failed in proof,—and dismiss his wife from this suit(a)

(a) Decree reversed by the Delegates. See vol. 3. p. 6.

PREROGATIVE COURT OF CANTERBURY.

METHUEN v. METHUEN.—p. 416.

A codicil virtually revoked by another codicil of a subsequent date, there being no express words of revocation in the latter instrument.

PAUL COBB METHUEN, of Corsham Hall, in the county of Wilts, died on the 15th of September, 1816, leaving four sons and four daughters. Of the daughters two were single, and one was married to the Honourable General De Gray, and another to Lord Edward O'Bryen. The following testamentary papers were found:—

A will dated 12th of October, 1809.

A codicil dated 14th of April, 1812.

A codicil dated 10th of May, 1813.

A codicil dated 1st of April, 1815.

The only question in the case was as to the validity of the codicil of 10th of May, 1813. This codicil was propounded by the widow of the deceased who was the universal legatee for life named in it, and opposed Mr. Paul Methuen the eldest son of the deceased, and the residuary legatee named in the will, who prayed probate of the will and the other codicils:—the ground of opposition to the codicil in question was, that it had been virtually cancelled by a codicil of a subsequent date, viz. that of the 1st of April, 1815.

The two codicils were as follows:—

“A codicil to be annexed to the last will and testament of me, Paul Cobb Methuen, of Corsham House, in the county of Wilts, Esquire, which will bears date the twelfth day of October, one thousand eight hundred and nine.

“Whereas, I the said Paul Cobb Methuen, have, in and by my said will, with respect to the sum of fifteen thousand pounds, the money by my marriage settlement stipulated to be set apart as the portions of my younger children, directed that the same should be equally divided between such of my daughters as shall be living at my decease (except my eldest daughter now the wife of Lieutenant General De Grey) and I have also by my said will directed Frederic Lord Boston, and Sir Thomas Gooch, Baronet, trustees, in my said will named, to raise out of my personal estate and effects, after payment of my funeral expenses, debts, and legacies, the sum of six thousand pounds, in trust to pay the same to all and every my daugh-

ter and daughters lawfully begotten or to be begotten (except my said eldest daughter Matilda De Grey) who shall be living at the time of my decease or born afterwards, in equal shares if more than one; and if but one to such only daughter at the days and times therein-mentioned. And I did also in and by my said will further direct that the interest and dividends of the said sum of six thousand pounds should be by the trustees in my said will named applied for and towards the maintenance, education, and benefit of my said daughters until their respective portions became payable. Now in addition to and for a further provision for my daughters Gertrude Grace, Catherine Matilda, and Cecilia Penelope Methuen, and also for my said daughter Matilda De Grey, and likewise as and for a further provision for my dear wife Matilda Methuen, I do hereby further direct the said Frederic Lord Boston and Sir Thomas Gooch to raise out of my said personal estate and effects, after payment of my funeral expenses, debts, legacies, the further sum of twelve thousand pounds of lawful money current in Great Britain, within eight months next after my decease, and to pay and apply the said sum of twelve thousand pounds unto my said wife, whose receipt shall be a discharge for the same; which said sum of twelve thousand pounds so to be further raised as aforesaid I do hereby give and bequeath unto my said wife, upon trust that my said dear wife do and shall place out the same at interest on government or such other security or securities as she shall approve, and take and receive the interest and dividends thereof from time to time as the same shall become due and payable, to and for her own proper use and benefit. And upon this further trust and confidence that, immediately upon and after the decease of my said wife, the said principal sum of twelve thousand pounds, and all interest and dividends due thereon, shall be paid and applied unto and amongst all and every my said four daughters Gertrude Grace, Catherine Matilda, Cecilia Penelope Methuen, and Matilda De Grey, in such shares and proportions, and at such time and times, as she, my said wife, shall by any deed or deeds, writing or writings, to be by her duly executed and credibly attested, or by her last will and testament in writing, or any codicil or codicils thereto to be executed and attested as aforesaid, shall give, direct, and appoint the same. Provided nevertheless that the portion or portions so to be given, directed, and appointed by my said wife as aforesaid, shall be the sole property of my said several daughters, and independent of any of their husband or husbands, and her or their receipt or receipts alone shall be a sufficient discharge or discharges for the same; and also upon this further condition, that on the decease or deceases of all or any of my said daughters without leaving legal issue, then and immediately after such her or their decease or deceases the share or shares of her or them as aforesaid shall be paid and applied unto my eldest son Paul Methuen, his executors, administrators and assigns; and in case all or any of my said four daughters shall happen to die before my said wife, then and in such case upon trust that the share of her or them so dying in the life-time of my said wife as aforesaid, shall devolve to and be paid and applied unto my said eldest son Paul Methuen, his executors, administrators and assigns. In witness whereof I have to this my codicil contained in two sheets of paper, set my hand and seal, (that is to say, my seal to the ribbon which

affixes the same together, and my hand at the bottom of the first sheet thereof, and my hand and seal to this second and last sheet thereof,) this 10th day of May, in the year of our Lord One thousand eight hundred and thirteen.

“PAUL COBB METHUEN, L. S.

“Signed, sealed, published and declared, by the said Paul Cobb Methuen, as and for a codicil to his last will and testament, in the presence of us, who have hereunto subscribed our names as witnesses thereto in his presence, and in the presence of each other,

“JOHN MEREWETHER, Attorney, Calne.

“ANTHONY COOPER, butler to testator.

“WILLIAM EADIE, footman to Mr. Paul Methuen.”

“A codicil to be annexed to the last will and testament of me Paul Cobb Methuen, of Corsham House, in the county of Wilts, Esquire, which will bears date the twelfth day of October, One thousand eight hundred and nine.”

“Whereas I, the said Paul Cobb Methuen, in and by my said will, with respect to the sum of fifteen thousand pounds, the money by my marriage settlement stipulated to be raised for the portions of my younger children, and disposed of by me as I should by deed or will direct or appoint, have directed and appointed that the same should be equally divided between such of my daughters (my son being otherwise provided for) as should be living at the time of my decease, (except my eldest daughter Matilda, now the wife of Lieut. Gen. De Grey.) And whereas I have by my said will also directed the Rt. Hon. Frederic Lord Boston and Sir Thomas Gooch, Bart. trustees in my said will named, to raise out of my personal estate and effects, after payment of my funeral expenses, debts, and legacies, the sum of six thousand pounds, in trust to pay the same to all and every my daughter and daughters, lawfully begotten, or to be begotten, (except the said Matilda De Grey,) who should be living at the time of my decease, or born afterwards, in equal shares, (if more than one, and if but one to such only daughter,) at the days and times therein mentioned; and I did also in and by my said will further direct that the interest and dividends of the said sum of six thousand pounds should be by my trustees in my said will named applied for and towards the maintenance, education, and benefit, of my said daughters, until their respective portions should become payable. And whereas since making my said will, and by a certain indenture of demise bearing date the 31st day of March last, made or mentioned to be made between me the said Paul Cobb Methuen, of the first part; and one of my said daughters, namely, Gertrude Grace Methuen, of the second part; the Rt. Hon. Edward O'Bryen, commonly called Lord Edward O'Bryen, of the third part; and Lord James O'Bryen, Giffin Wilson, Esq. the Rev. Thomas Anthony Methuen, and John Andrew Methuen, Esq., therein more particularly described, of the fourth part; in contemplation of a marriage intended to be shortly had and solemnized between the said Lord Edward O'Bryen and my said daughter the said Gertrude Grace Methuen secured and as-

sured as and for a marriage portion for my said daughter Gertrude Grace Methuen, the sum of ten thousand pounds of lawful money of Great Britain, to be paid Lord James O'Bryen, Giffin Wilson, Thomas Anthony Methuen, and John Andrew Methuen, their executors, administrators, and assigns, upon and under, and subject to the several trusts, provisos, conditions, and agreements, as are mentioned, expressed, and declared in and by a certain indenture of settlement bearing even date with the said recited indenture of demise, and made or mentioned to be made between the said Lord Edward O'Bryen of the first part; I, the said Paul Cobb Methuen and my said daughter Gertrude Grace Methuen, of the second part; and the said Lord James O'Bryen, Giffin Wilson, Thomas Anthony Methuen, and John Andrew Methuen of the third part. Now I, the said Paul Cobb Methuen, in consideration of such provision so made to and for my said daughter Gertrude Grace Methuen, do hereby revoke, annul, and make void the said direction and appointment so by me before made in and by my said will or otherwise with respect to the said several sums of fifteen thousand pounds and six thousand pounds, so far only as respects my said daughter Gertrude Grace Methuen, and her said share or proportion of the same respectively, but not further or otherwise with respect to my said other daughters, (except the said Matilda De Grey) and also except as to one thousand pounds, part of the said sum of six thousand pounds. And I the said Paul Cobb Methuen, do by this my said codicil request and direct the said Frederic Lord Boston, and Sir Thomas Gooch, Bart. to raise the sum of five thousand pounds only, instead of six thousand pounds, in the manner directed by my said will as aforesaid, and to pay and apply the same in the manner also directed by my said will, (except as to the said Matilda De Grey and Gertrude Grace Methuen.) And I the said Paul Cobb Methuen do also by this my said codicil, as a further provision for my said daughter Matilda De Grey, hereby further direct the said Frederic Lord Boston, and Sir Thomas Gooch, Bart. to raise out of my said personal estate and effects after payment of my funeral expenses, debts, and legacies, the further sum of three thousand pounds of lawful money of Great Britain, within eight months next after my decease, and pay and apply the same unto my said daughter Matilda De Grey, to and for her own proper use and benefit. And I, the said Paul Cobb Methuen, do by this my said codicil, as a further provision for my said dear wife Matilda Methuen, give and bequeath to her one annuity or yearly sum of six hundred pounds of lawful money of Great Britain, to be paid to her and her assigns by two equal half-yearly payments in the year, for and during the term of her natural life, to and for her and their own proper use and benefit, the first payment thereof to begin and be made immediately upon and at the expiration of six months next after my decease; and I do hereby charge and make liable all and singular my estates both real and personal, with the payment of the said annuity so by me by this my codicil given and bequeathed to my said wife as aforesaid. In witness whereof I have to this my codicil contained in four sheets of paper set my hand and seal (that is to say) my hand to the three first sheets thereof, and my hand and seal to the last sheet thereof, this first day of April, One thousand eight hundred and fifteen.

PAUL COBB METHUEN. L. S.

“Signed, sealed, published, and declared, by the said Paul Cobb Methuen, as and for a codicil to his last will and testament, in the presence of us, who have hereunto subscribed our names as witnesses, in his presence, and in the presence of each other,

JOHN MEREWETHER, Attorney, Calne, Wilts.

EDWARD M'KENSIE, butler to Mr. Methuen.

JOHN PEARCE, footman to Mr. Methuen.”

Mr. Merewether, the drawer of the codicil of the first of April, 1815, after detailing the circumstances which gave rise to that instrument, expressed his full conviction that the codicil was meant and intended by the deceased to take effect in the place and stead of his former codicil of the 10th of May, 1813;—the provisions of which, in consequence of the marriage of his daughter Gertrude with Sir Edward O'Bryen, were embodied in the codicil of the 1st of April, 1815. He deposed “that the said last-mentioned codicil was prepared by him for that purpose; and he was quite confident that the deceased so understood it, not only from the disposition made in the same codicil being in conformity with the deceased's intention, but also from his declared approbation thereof when read over and explained to him, and the satisfaction he expressed at the manner in which the deponent had contrived to meet his wishes.”

Adams and *Phillimore* in support of the codicil of the 10th May, 1813.

Swabey and *Lushington* contra.

JUDGMENT.

SIR JOHN NICHOLL.

The question is, whether the codicil of the 1st of April, 1815, is to be considered as an addition to the codicil of May 1813, or as a substitute for and consequently revocatory of it. The first instrument remains uncanceled, and there are no revocatory words in the second. It is contended that the Court has no power to inquire any further; but the same rules do not apply in a case relating to the factum of a will which would apply if the inquiry were concerning the construction of it.

In the Court of Probate the whole question is one of intention:—the animus testandi and the animus revocandi are completely open to investigation in this Court. Suppose in a case of fraud, or in a case of error, the residuary clause is omitted, it may be inserted by the Court.

It is admitted that if there is doubt on the face of the instrument, the Court may admit parol evidence. On the face of the papers it rather appears as if the testator intended one for the other;—it certainly is not absolutely impossible that the deceased might have intended to have increased the portions of his daughters, and the annuity of his wife;—but circumstances render it highly improbable that he should so have intended. There is a strong probability that he intended it as a substitute, and not as an independent codicil. Evidence, however, being admissible, there can be no doubt whatever;—the doubt, if any, is not from the intentions of the deceased, but from the mode Mr. Merewether has pursued in carrying them into effect;—it is quite impossible there can be any mistake as to the widow. It is unnecessary to detail the evidence;—there can be no doubt as to what the deceased intended, and what Mr. Merewether intended he should do. It would certainly have been better if Mr. Merewether had introduced an express revocation into the codicil;—but, on account of an omission of that kind, is the

Court to carry into effect that which is not the intention of the deceased? Other circumstances are strongly confirmatory of the intention;—the personal property is not more than 3000*l.* or 4000*l.* Mrs. De Grey's legacy, therefore, must suffer defalcation; she would clearly have less than the other daughters, when the testator intended they should be equal. It is true that the deceased was expressly told that the former codicil was to be destroyed, and he did not destroy it;—no immediate inquiry was made after it;—there is reason to think it was not at that time in London;—it was found on his death in the drawer of his library table, in Wiltshire, while the other testamentary papers were in a separate trunk. The strong probability is, that he never thought of the circumstance again;—it is difficult to entertain any doubt as to the real intentions of the deceased. The papers themselves lay a strong ground, and Mr. Merewether corroborates them. I pronounce for the will, and the other three codicils: but this codicil is not to be included in the probate.

I direct the expenses of this proceeding to be paid out of the estate.

COLE v. REA.—p. 428.

The duty of a next of kin to take out an administration.

THOMAS REA died intestate:—six months after his death no administration was taken out to his effects, when a creditor applied for it. The next of kin then appeared, and prayed that the administration might be granted to him in preference to the creditor.

The Court was moved that the creditor should be allowed his costs.

JUDGMENT.

SIR JOHN NICHOLL.

It was the duty of the next of kin to have taken out this representation earlier:—the creditor has been compelled to take these steps to recover his debt;—he is, I think, entitled to his expenses.

Costs given.

361-2:363-7.

ARCHES COURT OF CANTERBURY. 7. 563

LORD HERBERT v. The DOWAGER PRINCESS of BUTERA, falsely calling herself LADY HERBERT.—p. 430.

A caveat entered against an inhibition : the inhibition refused.

PREROGATIVE COURT OF CANTERBURY.

KINLESIDE v. HARRISON.—p. 449.

The criteria by which the capacity of a testator is to be examined ;—especially where there is a mass of contradictory evidence ;—where the testator is far

advanced in years,—and where occasional incapacity from violent nervous attacks, is admitted,—the mere opinion of witnesses of little weight—Capacity established.—Costs refused.

JUDGMENT.

Sir JOHN NICHOLL.

The question in this case arises on several testamentary papers of Andrews Harrison, deceased;—he died in the month of February, 1816. He made a will and several codicils:—the will and the four first codicils are not opposed; the other codicils are contested. The latter codicils, which are contested, are set up on the one part by Mr. Kinleside, who is one of the executors and the residuary legatee named in the will; and they are opposed by Mr. Benjamin Harrison, whose appointment as an executor under the will, and the benefits given to him in the will also, are revoked by these codicils.

To render the grounds of decision intelligible, it may be necessary to state the outline of the several testamentary dispositions. The will bears date in the month of June, 1808;—it is very long and complicated;—drawn up by a professional gentleman;—it occupies twelve brief sheets of paper, and was executed in the presence of three witnesses: it has in view two contingencies;—one, the case of the testator dying before his brother, Mr. John Harrison;—the other, the contingency of his surviving his brother. It gives a great variety of legacies to friends, to relations, and to servants; some of them pecuniary legacies, others of them stock legacies in the long annuities; and respecting a part there is a trust raised. The deceased had a small real estate, consisting of Shawfield Lodge, at Widmore, near Bromley, in Kent; and he had also a very small property in Derbyshire. Shawfield Lodge is given to trustees for the brother, Mr. John Harrison, for life, with a power to dispose of it by will or deed; but in case he made no disposition of the property, then Shawfield Lodge, except Mrs. Jukes's house, which I shall have occasion to notice hereafter, is given to Mr. John Harrison. The small property in Derbyshire is given to Mr. Roe, and the residue of his personal estate is given to his brother, Mr. John Harrison;—and in this event the executors appointed are Mr. John Harrison, Mr. William Stanley, and Mr. Paul Malin. Thus far the will looks to the event of his dying before his brother:—it then goes on to provide for the other event, of his surviving his brother; and in that case, without revoking any of the previous legacies, gives a variety of additional legacies; among others, a legacy to Mr. Paul Malin of 18,000*l.*;—raises a long and intricate trust for the children of Mr. Taylor; gives pecuniary legacies to the amount of 40,000*l.*;—gives Shawfield Lodge to Mr. Benjamin Harrison, except Mrs. Jukes's house;—her house, and fixtures, and furniture are given to trustees for her use during her life, and then that house, and fixtures, and furniture are to go to Mr. Benjamin Harrison. The furniture and plate, and other articles at Shawfield, are given to Mr. Benjamin Harrison, and the residue is then given to Mr. Kinleside; and in this event the executors are Mr. Benjamin Harrison, Mr. William Kinleside, and Mr. Paul Malin, so that Mr. Malin was an executor in both events, but Mr. Harrison and Mr. Kinleside were only executors in the event of his surviving his brother. The deceased's brother, Mr. John Harrison, made a will at the same time, and upon similar principles, though not precisely the same in all respects, for several of the legacies are considerably different;—but Mr. John Harrison had

no real estate to dispose of;—he does not make any disposition whatever in respect to Shawfield Lodge;—he would take no legal estate in Shawfield Lodge, except in the event of surviving his brother, and then he would have a power of disposing of it.—This is the substance of the will.

The first codicil is dated in June, 1809, and by that Mr. Benjamin Harrison is appointed an executor in both events, even if Mr. John Harrison should survive his brother.

The second codicil is dated in February, 1810;—it gives some additional legacies;—one of 300*l.* to Mr. Walmsley, 100*l.* to Mr. Roberts, and it recites that the deceased having, with his brother, given up a bond of 12,000*l.*, and a note of 1000*l.*, together with all the interest thereon, to Mr. Paul Malin;—it revokes the legacy of 18,000*l.* given to Mr. Paul Malin, and substitutes in the place of it a legacy of 5000*l.*;—it also in the case of his brother John dying first, gives the books and pictures at Shawfield to Mr. Benjamin Harrison, provided the residue amounts to 11,000*l.*, otherwise those books and pictures are to be a part of the residue to go to Mr. Kinleside.

The third codicil bears date in October, 1810;—by that the furniture and books and pictures in Mrs. Jukes's house are given to her absolutely.

The fourth codicil bears date in September, 1811, and contains three additional legacies of 500*l.* each.—The brother, Mr. John Harrison, made similar codicils to the two first of these four, but he made no codicils to correspond with the latter of these four.—These are the uncontested dispositions.

The four contested codicils are to the following effect:—the first of them, which is marked with the letter F, is dated in August, 1812;—it is written in the margin of the codicil of February, 1810, and is attested by Mr. Boodle and William Taylor, and by that the books and pictures at Shawfield Lodge, after the death of his brother John, are given to Mr. Trevillian:—however, this codicil is embodied in the next, which the Court is going to state;—it is marked with the letter G, and bears date 2d of September, 1812, two days afterwards:—it is attested by Mr. Boodle, William Taylor, and William Coleborn, and revokes the appointment of Mr. Benjamin Harrison as one of his executors, both in the event of his dying in the lifetime of his brother, and in the event of his surviving his brother:—and it appoints Mr. Kinleside an executor in both events: it revokes the bequest of the books and pictures to Mr. Benjamin Harrison, and gives them to his brother for life, and then to Mr. Trevillian.

The third codicil bears date the 21st of March, 1814, and is in the deceased's own hand-writing, signed by him, but not attested by any witness: and it declares his wish to give Shawfield Lodge estate and premises to his residuary legatee, the Rev. William Kinleside, and revokes the legacy left to Mr. Paul Malin.

The last codicil, which is in duplicate, marked I and K, bears date the 27th of April, 1814, one of the duplicates, that marked I, being in the hand-writing of the deceased himself, and attested by three witnesses; it revokes all the devises and bequests given to Mr. Benjamin Harrison and Mr. Paul Malin, and it revokes their appointment as executors;—it revokes the bequest of the books and pictures to Mr. Trevillian, and gives all the property at Widmore, and all his plate, china, and also the books and pictures, live and dead stock whatsoever, to

Mr. Kinleside; and it again appoints Mr. Kinleside the residuary legatee and devisee.

These are the contested instruments, and the dispositions contained in them.—As all these instruments, upon the face of them, are regularly executed and attested, and are admitted to have been signed by the testator, and witnessed by the several persons whose names are subscribed to them, it may appear proper to examine, in the first place, the grounds upon which the execution of them is to be impeached, before the Court can well estimate the weight and force of the evidence which is offered in support of the execution.

The grounds of opposition are of two sorts:—first, that the deceased laboured under mental imbecility, so as to be utterly incapable of any testamentary act whatever; the second is, (but which applies to the two codicils only) that they were obtained from the deceased by fraud, and circumvention, and importunity.

The material parts of the plea, detailing these grounds of opposition, are to this effect. Mr. Benjamin Harrison, in the 5th article of his allegation, states that about 1812 the mental faculties, and especially the memory of Mr. Andrews Harrison, had become weakened from his great age, and the general decay of nature, and, about the middle of that year, were so much impaired as to render him incapable of comprehending the state of his affairs, or of recollecting those about him, or of understanding what passed in conversation;—that the deceased was, from that time to the time of his death, childish and incapable of the management of his affairs, and was so considered and treated by the said Sarah Jukes, and the other persons about him; and in consequence thereof, the servants and all others, from that time down to the time of his death, used to apply to Mr. Kinleside or Mrs. Jukes for orders. The deceased had lost the knowledge and recollection of his friends and acquaintance, and when any person called, it was necessary to explain who they were, otherwise he could not recognise his most intimate friends;—that he frequently got up in the middle of the night and lighted his candle, and would suffer it to burn out in the socket;—that he would frequently make water in the fire in the presence of Mrs. Jukes, being utterly unconscious of the impropriety of so doing;—that he was unimpressed by the death of his brother, which took place in November, 1813; that he took very little notice of it, and was in no degree moved or affected thereby; and then it goes on to state other circumstances, showing entire incapacity in the deceased.

The second ground which is set forth in a subsequent article is, that Mr. Kinleside, Mrs. Jukes, and Mr. Wells, repeatedly urged and pressed the deceased to give the Widmore estate to the Rev. William Kinleside, and particularly after the death of his brother John Harrison; that for that purpose a Mr. Latter drew up a codicil without any instructions from the deceased; that the deceased being pressed to make a copy, did so, after repeated attempts, and at different intervals, with the assistance of Mrs. Jukes, although he was incapable of understanding the meaning and import of it, and that, on the day of the execution, he was not of sound mind, nor capable of making a codicil. So that, according to this plea, here was entire incapacity in the first place; and, in the second place, here was importunity, by which this instrument was obtained from the deceased.

In answer to this it is pleaded, on the part of Mr. Kinleside, in support of the capacity, that the deceased had for many years been subject to nervous attacks; that the effect of those attacks sometimes continued for a few minutes only, but at other times for some hours, and that, except when under the influence of such attacks, the deceased was at all times, in the years 1812, 1813, and 1814, and down to the time of his death, of sound mind, memory, and understanding,—knew his friends,—conversed with them,—corresponded with Mr. Kinleside and other friends,—every day read aloud to Mrs. Jukes the Psalms, and Scriptures, and Lessons of the day,—drew drafts,—entered his accounts in a book, all which accounts are exhibited,—played cards, and so on, and was fully capable of making the several instruments which are opposed.

These are the cases set up on both sides;—and, in support of the different pleas many witnesses have been examined, and their depositions contain one of the largest bodies of evidence that has ever been exhibited in these courts.

From what has been already stated, it is obvious that the leading point in the cause is the deceased's capacity. To all persons who are in any degree conversant with proceedings in this court, it is well known, that upon the point of capacity, evidence apparently the most contradictory frequently occurs;—nor is the circumstance difficult to be accounted for, without imputing to either set of witnesses intentional falsehood;—and certainly it is the duty of the Court to endeavour in candour to reconcile apparent contradictions, rather than to attribute perjury to those who are called upon to give evidence before it. In the first place, it may be observed, that a large portion of evidence to capacity is evidence of mere opinion; and upon matters of opinion mankind differ, even to a proverb. In the next place, there is no fixed standard by which each witness fixes and estimates his opinion of capacity;—one person, seeing a testator in extreme age, or under extreme sickness, thinks, that if he knows those about him, and can answer an ordinary question with respect to the state of his illness, or of his wants, such and similar matters render him capable of giving effect to a disposition by will, however complicated it may be, by the mere formal execution of the instrument; while another person may be of opinion that though a testator is in the ordinary management of his own affairs,—can hold reasonable conversation,—can fully comprehend all the usual and simple transactions of life, yet if he is unable to take the active management of all his concerns, however complicated those concerns may be, or if he is liable to become confused by entering into intricate transactions, he is totally incapable, and cannot enter into a testamentary disposition, however plain and simple it may be. Now, where opinions are formed by such different standards, it is obvious that much variety must take place.

Differences will also arise from other causes:—first, from the different abilities of witnesses to form such opinions;—secondly, from their different opportunities of seeing the person;—and, thirdly, from the different state and condition of the testator's mind at different times. It is certainly true that the study of the human mind is an abstruse science; the different lines and traits of the understanding are matters which attract the notice and consideration of the intelligent; ignorant persons and enlightened persons will form very different opinions upon subjects

of this kind: ignorant persons, servants, and those in their condition, who form their judgments in the conversation of the kitchen circle, are very apt to form erroneous opinions on matters of this sort; and this will be the case, even without throwing in the additional ingredient which takes place in those circles, the loose suspicions and prejudices by which their judgments are often biassed and carried out of their true course. In the next place, from the different opportunities persons have of judging they will form different opinions: persons who see a testator only occasionally will form different opinions from those who have better opportunities of judging. We know that little appearances occurring in this way are extremely fallacious, yet we often find occasional observers depose with great confidence. It frequently happens that the most ignorant are the most confident. In this case we have an under gardener speaking of the deceased, who was always deaf, sometimes nervous, and whom he only sees in the garden, but seldom converses with him, yet venturing to swear, (truly, I have no doubt in his own opinion) that he is *quite certain* the deceased was not capable of making a codicil during any part of a particular month, which happened three years before his examination. This kind of opinion is still more various where the testator's capacity is fluctuating,—where he is sometimes better and sometimes worse; and this is generally the case with persons labouring under old age, or other infirmities; it is so, even where there is no special attack occasionally operating; accidental cold, or other indisposition, often renders an old infirm person worse one day than another; after a good or bad night a person will be alert or dull; so after a night's sleep, a person may be active and capable of considerable exertion even in matters of business, who, in the afternoon, while the process of digestion is going on, shall appear drowsy and torpid, and not able to rouse himself into action. The humour of a testator will also sometimes make him apparently almost fatuous, or induce him to rouse himself into exertion, as the occasion is either interesting or disagreeable to his inclinations. Now, these different considerations, (and they might be much more spread) while they tend to reconcile the apparent contradictions of witnesses, render it necessary for the Court to weigh such evidence with very great attention—to rely but little upon mere opinion—to look at the grounds upon which opinions are formed, and to be guided in its own judgment by facts proved, and by acts done, rather than by the judgment of others. These preliminary observations may, by being applied to the evidence, save the time and trouble of repeating them when the depositions come to be stated.

In this Court it has been usual, in such cases as the present, where there is a contrariety of evidence upon a variety of different transactions, to state the depositions pretty much at length, in order to show more distinctly the grounds upon which the Court decides; but really in the mass of evidence in this case, it is hardly possible to state any considerable part of it, which can bear any proportion at all to the whole. The utmost that the Court can do is, to state such general outlines and leading features of the depositions as shall pretty much show the complexion of the evidence. This I shall endeavour to do as much as possible in the terms used by the witnesses themselves, proposing, first, to consider the evidence as to capacity and its result, and then to examine the proofs of the factum and the charges of fraud which are imputed in the course of that evidence.

There are some facts however which, without reference to the evidence, may be stated historically, they being assumed and admitted on both sides, and not liable to controversy. The deceased and his brother Mr. John Harrison, had been in business together in London, from which, having made a fortune, they retired to Widmore, in the county of Kent. The deceased, who seems to have been at all times rather averse to the trouble of housekeeping, resided with the uncle of Mr. Wells, at Bickley; Mr. John Harrison living at that time in a small house in the neighbourhood. Mrs. Jukes, whose husband I think was cousin to the deceased, and had formerly lived at Bickley, upon the death of her husband, was invited by the deceased to return to that neighbourhood, and reside in a house he took for her residence. In the year 1809, the deceased left the house of Mr. Wells, and went to reside with Mrs. Jukes, where he continued till the time of his death. Soon after his going to live at Widmore with Mrs. Jukes, the place was on sale, the deceased purchased it, and on a part of it he built Shawfield Lodge, which was intended for the joint residence of himself and his brother. His brother went to reside in it, but the deceased continued to reside with Mrs. Jukes. Mr. John Harrison inhabited Shawfield Lodge, down to the time of his death in 1813; he having, about two years before his death, through age and infirmity, been reduced to childishness and imbecility, and during the period of that childishness and imbecility the deceased managed the money concerns of his brother, Mr. John Harrison, and furnished money for his purposes; but the more immediate business of Mr. John Harrison, paying his bills, looking over his accounts, and other matters of that sort, was executed first by Mr. Paul Malin, and afterwards, from the beginning of 1813, by Mr. Kinleside. Mr. John Harrison made a will much to the effect of that of Mr. Andrews Harrison, leaving many legacies, but leaving the residue to his brother Mr. Andrews Harrison; and in November 1813, Mr. Andrews Harrison took probate of that will with the other executors, and survived about two years and a quarter.—Such is the outline of his history.

There are some other particulars which admit of no controversy; he was the elder of the two brothers, and he had attained the very unusual age of about ninety, so that he was from eighty-six to eighty-eight when these codicils were made: a great age, exceeding even the age when we are told that “the strength of man is but labour and sorrow.” This raises some doubt of capacity, but only so far as to excite the vigilance of the Court; for the law allows a person at any age to make a will, provided he retains the disposing faculties of his mind. Age is an uncertain criterion of mental powers; for those powers are often retained by persons even above that age in a greater degree of perfection than they are by others, twenty years less advanced in life, who may yet have no other apparent infirmities than those of age. The deceased must have had rather extraordinary faculties for his age, if we look to nothing but the will itself, which is not controverted; he was eighty-two then; it is a most complicated disposition of personal property; it is made by Mr. Boodle, who is a very cautious and respectable solicitor, and who would not interfere further than was necessary to carry into effect the intentions of the deceased; and yet we find that the deceased, at this very advanced age, with only this cautious assistant, is able to frame this very complicated will; of that will, however, these codicils contain very consider-

able alterations; and when a person in a very advanced stage of life makes considerable alterations in an instrument solemnly and cautiously made, the circumstance tends further to excite the jealousy and vigilance of the Court, and such an alteration claims still further attention, where the will itself is made in some degree as a sort of reciprocal will, in conjunction with a brother, with at least a full communication of their intentions, each providing for the event of surviving the other.

Now, though it is admitted, that this circumstance imposed no legal obligation upon the survivor, of not making any alteration—that there was no express condition of any kind between them;—nor, as it will appear by the evidence, was there a distinct understanding to that effect; yet, though it imposed no moral obligation upon the survivor not to make any alterations, it would at least induce him to proceed with extreme unwillingness, to alter those dispositions which had been settled between him and his brother, unless there should occur some rational cause for such alterations; but, beyond this length, I never could understand the reasoning, which was so much pressed at the bar, both upon the admission of the allegation, and afterwards, on the hearing of the cause, upon this point, and which seems to have made some impression upon the parties themselves, as well as upon some of the witnesses who have been examined. For, on the other hand, if there did, in the opinion of the testator, exist a rational cause for making an alteration, he would not only consider that he had a moral right to do it, but he would have thought that his brother would have concurred as much in that opinion, as that he entertained it himself; for, as the witnesses state, they were most affectionate and confidential, and “had but one mind;” and, therefore, he would naturally conceive, that his brother, if he knew the circumstances, would accompany him in the alteration upon those rational grounds which existed for the making of such alteration: for example, as occurs here; each had, in case of being the survivor, given to Mr. Paul Malin 18,000*l.*, they afterwards gave up to this young man a bond and note for 13,000*l.*; then each of them reduced his legacy to 5000*l.*, and each of them, in the reduction of that legacy, (for it is so declared in the codicil itself) looked to the residue being at least 11,000*l.* Now, if after the death of either, or if after the incapacity of either, Mr. Paul Malin had, by a further bond, incurred a further debt of 5000*l.* in the lifetime of the party, which debt was given up to Mr. Paul Malin, or was lost through his bankruptcy, by which he would in fact receive his 5000*l.*, and by which loss, if the legacy was also to take place, the residue might be reduced to 6000*l.* instead of 11,000*l.* would not the survivor say, it was neither my brother’s intention nor my own, that Mr. Paul Malin should have the sum of 5000*l.* in our life-time, and the residue be reduced to 6000*l.*; and, therefore, in rescinding and revoking the legacy, I am not only doing what I the survivor think just, but I am carrying into effect the intention of my deceased brother also. In an alteration of this sort, or any other alteration, he might conceive he had rational grounds for making it, and in which he might therefore conceive his brother would concur. I can see nothing which imposed on him a moral obligation, or made him unwilling to make the alteration. But at last this is a mere circumstance of inference and probability, bearing on the capacity; for if the capacity and volition are proved, the legal right to make the alteration is not at all denied.

Another fact not controverted, is the occasional incapacity of the de-

ceased, arising from certain nervous attacks, coming on at different times, and their effects of different durations; and during those attacks it is admitted the deceased was incapable of any rational act. This circumstance, however, bears upon the case in two opposite directions; it renders, in the first place, the capacity at least fluctuating, and imposes on the party setting up these instruments, the obligation of proving that at other times the deceased was capable, and that these instruments were made during that capacity; but, on the other hand, if these attacks produced only a temporary incapacity, and the deceased was at other times in full possession of his mental powers, these occasional attacks account for the opinions of many of the persons who only saw the deceased occasionally, and take off, therefore, much of the effect and weight they attribute to the instances they adduce. This consideration also renders it the less necessary for the Court to enter into the particular instances of the deceased's not knowing persons, or beginning to undress himself in the day-time, or other circumstances of this sort; for, it is admitted, there were times in which the deceased was in a state in which he did not only not recollect, but could not be made to understand persons or things, the degree in which he was affected being different at different times. That the deceased was subject to considerable deafness is also admitted. This defect always makes a person appear to disadvantage in society; and to accidental observers, not being able to hear every thing that passes, he appears dull and stupid, and is in reality less excited and entertained in company than other persons; yet such a person may, when he does hear, perfectly understand, and be able to converse quite rationally. The deceased was nervous and low spirited when any thing affected him. If then we picture to ourselves a person approaching to ninety years, deaf and nervous, walking in his garden or in his immediate neighbourhood, such a person meeting the observations of those who occasionally saw him, would not make a very favourable impression as to his capacity; while it might be, that, if he entered into conversation with them, he would show that he was in possession of considerable mental powers. Some of his bodily powers were very good, except when under these attacks; his health was good, and he was so alert he could run up stairs, which he sometimes did, to avoid Mrs. Jukes's visitors, who he did not wish to see, being rather a shy man. His eye-sight was perfect, therefore, his not knowing persons did not arise from any defect of sight; he read the newspaper, and the psalms, and the lessons of the day without spectacles, and wrote a fair hand to the time of his death. Now these facts are so clear they cannot be controverted; and having stated them and the way they bear upon the case, the Court will now proceed to a review of the evidence upon the great controverted point of the capacity of the deceased,—or, as it is more technically described, his mind, memory, and understanding, and his competence to do any act requiring thought, judgment, or reflection.

In support of the plea alleging all these facts, thirteen witnesses have been examined; seven of those were either servants of Mr. John Harrison, the brother, or persons in that condition of life; three others are gentlemen, acquaintances of the deceased, who visited him occasionally, and the remaining three were the maid-servants of Mrs. Jukes.

The first witness examined is Mr. William Tatton; he lived as butler to Mr. John Harrison for thirty-five years, and deposes to incapacity

pretty nearly in the terms of the plea, and in some instances perhaps beyond it, for he carries it further back; he says "he does not entertain any doubt that the deceased's memory and mental faculties had become so weakened from great age, that in or about 1812, he was incapable of comprehending the state of his affairs; he could for the most part understand what passed in conversation at the time, but could not retain it, his memory was so exceedingly impaired at particular times; on occasions, which occurred frequently, he could not understand any thing, but was quite lost and childish, and nine times out of ten the deceased did not know any person unless he was told who it was, and excepting those who were constantly about him, and in attendance on him. He has seen him at Shawfield, when he would walk through the house and about the garden without speaking a word to any one; that when he did speak it was commonly not more than to ask 'how is my brother?' he would burst out crying, as frequently as not, and appeared to be very gloomy and unhappy, but which the deponent supposed to proceed in a great measure from his seeing his brother in the state in which he was; that from the beginning or middle of 1812, the deceased was in a very childish state, incapable of the management of his affairs, and from that time he continued to grow worse, down to the last time the deponent saw him, which was about a month after the death of Mr. John Harrison; there were intervals during which the deceased did know what he was doing, but they were of very short duration, and though he knew what he was about at the time, his recollection of the past was very deficient. The deponent was very little down at the house of Mrs. Jukes, where the deceased lived; he never went there except when sent on a message. In 1812 the deponent had the care of the domestic concerns at Shawfield; the deceased used to ask him for his book of weekly expenses, which he would lock up, without looking at, and keep it for two or three days, till, as happened sometimes, Mrs. Jenkins, a neighbour, came to Shawfield, and she looked it over and told him it was all right, and then he returned it to the deponent." He says upon the ninth interrogatory "that he never settled an account with the deceased: Mr. Kinleside always settled with the respondent during 1813, though he might have received money from him between Mr. Malin's accident and Mr. Kinleside's taking the management, which was the beginning of 1813; he believes he did receive either a draft or bank note from the deceased, but he does not remember having received either from him at any other time; there was no more business transacted between him and the deceased than that the deceased's man would tell the deceased that the respondent wanted money, and when the deceased came up he would bring it." He says upon the second interrogatory, "that soon after the death of the testator, the producent told the respondent, that he meant to dispute some parts of the deceased's testamentary papers, and he asked the respondent if he remembered some general circumstances, and if he did he should call upon him. He has seen the producent twice since, who afterwards wrote to the respondent to request him to get the witnesses together at Bromley, on Monday last, and to get Fuzzey to Bromley on the Saturday before, and to get lodgings for the examiner;" and this witness, who is vouched, Fuzzey, says, on the second interrogatory, "that Tatton sent to him one day last year to come to his house to meet the producent, who then asked him some questions similar to those now put.

He does not now remember very particularly what then passed, but he thought the business at an end, till one day last week, when Mr. Tatton desired him to meet the producent again at his house."

Certainly, in the judgment of this man, Tatton, the deceased was incapable of making his will, but there are some circumstances in his evidence, which make the Court rather hesitate in concurring in his opinion, however sincere he may be in giving it. From his answer to the second interrogatory, which has just been stated, it appears, that soon after the death of the deceased, he was employed as a sort of agent, and that he is again employed for the purpose of collecting the witnesses together: this is very apt with persons in his condition in life to create a sort of bias upon the judgment. He principally forms his opinion from seeing this old gentleman coming to Shawfield, much distressed at his brother's illness, walking through the rooms or about the gardens, and not conversing with him;—the deceased seldom asking him any other questions than how his brother did, or for his book of accounts. He ventures, however, upon these means of knowledge, to depose to some of these points. He says, he was seldom at Mrs. Jukes's, and never went there except when sent on a message; and yet he ventures to depose that the deceased, nine times out of ten, did not know any person unless he was told beforehand who it was. Now, how Tatton could know this, who, perhaps, was not present once in twenty times, when any of the deceased's friends approached him, it is difficult to conjecture. Again, he says, that the deceased asked for his book of weekly expenses, which he would lock up without looking at, till he had an opportunity of consulting some other person upon the correctness of his book. Now, how should the witness know this; the deceased kept the book two or three days; it is proved that he transacted his business in his own room, at Mrs. Jukes's; and, therefore, the witness could not know whether he judged of the book from his own consideration, or the assistance of any other person. He says, that he might receive one or two drafts in 1812, but that in 1813 he did no business with him; but it comes out in a further part of the interrogatories, that when Tatton wanted money, he used to tell the deceased's servant that he wanted money, and that the deceased when he came up to Shawfield would bring it. It so happens that in this very year, 1813, when the witness says he received no draft at all from the deceased, here are no less than sixteen drafts drawn in favour of Tatton; three only out of the sixteen are filled up by Mr. Kinleside, the others are filled up by the deceased, and they are all signed by him. In the year 1813, Mr. Kinleside was at Shawfield but a small portion of his time; the witnesses, Peebles, Hope, and others, state that he would come there and stay from Monday till Saturday; he was a clergyman, residing in Sussex, and having a living to take care of there, he would stay at Shawfield four or five days together, and then be absent three or four weeks. By his filling up the draft it should appear, there was no clandestinity in his acts; and, therefore, it is extremely probable the other drafts in the hand-writing of the deceased were drawn by him without assistance for the purpose of supplying Tatton when he wanted money. Not only are the drafts filled up by the deceased himself, but the sums are entered with the greatest accuracy at the other end of the check; they are filled up in printed checks, thus, "John Harrison, (mentioning that they were for his brother's account,) for William Tatton. 50/.

25th February, 1813. In the checks there is a particular accuracy, for though printed with the word "London," yet in every one the deceased scratches out London and inserts Bromley. Here is at the conclusion of them a still more singular piece of accuracy; in all but the last they are signed "*Andrews Harrison, for John Harrison;*" but the last of them is not so drawn, but is signed, "*on the late John Harrison's account,*" varying the phrase. Now the fact is, that since the drawing of the preceding drafts Mr. John Harrison had died: this is a strong instance, if it comes from the deceased himself, not merely of memory and understanding, but of correct and minute attention and activity of faculties; and yet it is stated by several of the witnesses, that about and soon after the death of Mr. John Harrison, the deceased was apparently even much worse than usual. It is certainly true that little incidental facts of this kind often weigh much more in the proof of capacity than the opinion of a great number of witnesses, such as Tatton, forming their opinions on such ground as he had for his; it is indeed possible that Mr. Kinleside, or some other person, might be standing by, and might have dictated this and all the other drafts to the deceased, but of that there is no proof; they are in the hand-writing of the deceased, and the instruments are exhibited; but the Court will be better able to judge whether the deceased was capable of doing this without assistance when it comes to other parts of the evidence applying to circumstances of a similar sort.

The next witness to whom I shall refer is Browning, who is in the same situation in some degree as Tatton; he was footman to Mr. John Harrison, from 1808 to the time of his death, and he gives his opinion of the incapacity of the deceased not quite so early or so uniformly as his fellow witness, Tatton; for he states, that about the latter end of 1812, or the spring of 1813, the deceased's memory began to fail him; he was subject to nervous complaints, which came upon him frequently, and upon those occasions he was altogether in a lost state, but independent of that complaint his memory had become impaired. The failure of memory became worse in 1813, and before the end of that year the deceased had become nearly, if not altogether, childish, and continued in that state till the month of March, 1814; he says that the deceased was not always in a state of forgetfulness, but there were times when he appeared sensible of what he was doing; he believes he was, about September, 1812, capable of the management of his affairs; that is a period which applies to the two first codicils; that he has no reason to believe that he was treated by those about him then as a childish person. From the time Mr. Benjamin Harrison came to live at Widmore, all orders were given by him, and after he removed, Mr. Kinleside was consulted, so that the deceased seldom gave any directions himself when he was competent to have so done. Before his brother's death, he used frequently to go about the house and garden at Shawfield, looking about him, and appeared not to know what he was about; that he was roused by any one being with and talking to him, but when alone he drooped and lost himself very much; the deponent never was about the house where the deceased lived, except to take a message, and he never stayed there any time: he then goes on and gives an instance of meeting the deceased in the spring of the year 1814, about half a mile from his own house, and the deceased not knowing him, but when he saw the witness in the evening he recollected him, and

said, he wondered he did not know him when he met him, a circumstance to which the Court attaches very little importance, for it is, at most, only an instance of the deceased's not knowing a person, which, it is admitted, he was liable to, though it should seem rather, from what passed in the afternoon, as if this had been a mere accident. It also proves that the deceased did at this time walk half a mile from his house without being attended, and that he was not considered as in actual childishness, and under a total loss of his mental faculties.

The next witness is Curtis, who was coachman to Mr. John Harrison, and who is now an exciseman at Reading, and he says, "that he first observed the deceased's faculties to decay about twelve months before his brother's death; he was then growing very much lost; at times he was collected, at other times his memory was gone; about the middle of 1812 he grew worse; he does not know what could be the cause of his forgetfulness, except it were old age, as he believes it was; that about the time of his brother's death, the deceased appeared very much lost, and was frequently walking in a lonely way, and talking in such a simple whining manner, as showed he was quite lost, and could not collect his thoughts; he was not always so, but very frequently, and almost constantly about that time; he frequently burst into tears and appeared full of care, not taking notice of any one; the deponent has seen him undress himself in the morning when he was sitting in his brother's house, and was very much agitated, all in a kind of tremble, and at such times altogether lost; this was owing, as the deponent believes, to a sort of fit, of a nervous kind, to which he was subject;" he mentions an instance in August, 1814, of the deceased's meeting him upon Widmore-green, just above Shawfield; the deponent made his obeisance to the deceased, and asked how he did, which he returned in a very polite manner, as though he had been a stranger, and a gentleman, evidently not knowing him. He says, upon the 17th interrogatory, "that the respondent, after the death of Mr. John Harrison, continued upon the premises, having very little to do till he was discharged by Mr. Kinleside, in May or June 1814; he afterwards lived with Mr. Olmius, and went to Reading in November 1815; he says that the respondent called on the deceased shortly before he went to Reading (that was in the latter end of 1815;) he got Latter, the deceased's servant, to ask the deceased to lend him ten pounds, towards the expense of his moving to Reading; a few days afterwards Mr. Kinleside gave the respondent twenty pounds, as from the deceased; a day or two afterwards the respondent called to thank the deceased, Mr. Kinleside having told him that it was a gift from the deceased; the deceased told the respondent he was very welcome to it, and hoped it would do him good; the deceased seemed pretty well, and was then, as he believes, of a sound mind."—What then is the fair result of this man's deposition?—In chief he certainly deposes pretty strongly to his opinion of a fluctuating capacity at least, particularly about the time of the brother's death; but here, so late as November 1815, this witness, by his own conduct, appears to have considered the deceased as in possession of his faculties, for he applies to him to borrow money, and he goes to return him thanks for the present which he has made. What does the deceased's conduct imply upon this occasion? why to this old servant of his brother's, who it appears, on his own evidence, had been very attentive to his brother in his last illness, instead of lending him the

money, he makes him a present of twenty pounds to place him in his new situation at Reading; and when Curtis comes to return thanks for the gift, he recollects the transaction, tells him he is very welcome to it, and hopes it will do him good; and, as Curtis admits, he was of sound mind, in November 1815, which is a year and a half nearly after this testamentary instrument was executed.—The impression, therefore, of this deposition, taking the whole together, is rather favourable than adverse to general capacity.

The two next witnesses are Peebles and Hope, the gardener and under gardener, and they give an unfavourable opinion of the deceased's capacity, as far as their opportunities enabled them to judge of it, but they also assign partly the reasons upon which they found their opinion. Peebles says, that the faculties of the deceased began to decay about Christmas, 1812; the deceased at that time came into the garden, as he did every year, to distribute Christmas-boxes, and though he gave the deponent his Christmas-box, he appeared to have forgotten who the deponent was, for he called him Curtis, which was the coachman's name, and asked him what fruit he was gathering; that at times, when walking about the garden, he remarked upon the weather being hot or cold, or something of that kind; that he saw and conversed with the deceased so little that he can hardly depose to his state of mind; he verily believes that in April, 1814, the deceased was not of sound or disposing mind, memory, or understanding, or capable of understanding the nature of his affairs or of his testamentary arrangements. Hope deposes much to the same effect, and says, upon the 11th article, he is quite certain the deceased was not, during any part of April 1814, of sound disposing mind, memory, or understanding.

Now these witnesses do not weigh very much with me, for where they rely on facts, the Court is enabled to judge for itself: the circumstance of his calling Peebles, Curtis, may have an effect upon an ignorant person, but no intelligent person will rely on such a circumstance; even the counsel gave it up, and thought it too trivial to argue, and without entering into an analysis of it, it is quite common to the most ordinary observer, it occurs every day; instances more striking than this have occurred to my observation during the progress of this cause: this is absence of mind, but absent persons have their memory as perfect as persons not liable to such blunders. As to asking him what fruit he was gathering, that might be a mere joke, of which it is proved he was fond, making an observation to the gardener, what fruit are you gathering? Taking the whole evidence together, it bears strongly in favour of memory and understanding, for he recollects the season of the year; he goes to give the Christmas-boxes, he gives the usual amount, he pays them himself, and he enters them in his account book, because upon the very day after Christmas-day, December the 26th, 1812, are entered the sums which he paid to the different servants of John Harrison, and the sums which he paid to the different servants of Mrs. Jukes upon that day;—and, therefore, taking the whole of this evidence together, it as strongly marks capacity as those little instances which make an impression on the witnesses bear the other way.

Another witness, a gardener, Simmons, deposes to having met the deceased twice in 1814, in May and June, and twice in 1815, in July and August, and he says that the deceased did not know him, and that Mrs. Jukes could not make him understand who he was. These oc-

currences are accounted for by the occasional attacks to which he was liable.

The only remaining witness of this class is Fuzzey, and the account which he gives of the deceased is this:—"he had lived as coachman with John Harrison for some years; he then became a farmer and corn-chandler in the neighbourhood, and he served the deceased with corn: he mentions that the deceased had a mare, that she took to kicking in the gig when Mr. Malin was driving her, and Mr. Malin had the misfortune to break his leg; the deceased had had the mare for some years, she was his riding mare as long as he was able to ride; after this accident he gave her to the deponent; this was about the latter end of 1812." That was after the time when they date the incapacity. Now, in respect to the mare, he says, upon the nineteenth interrogatory, mentioning the circumstances that passed on the occasion,—“that the deceased said, that he would not keep, or use the mare any more, as she had kicked him in the chaise. He asked the respondent what she was worth, who said fifteen pounds. He replied, she is not worth half that; do you think she is worth a guinea? The respondent laughed, and said Yes, Sir. The deceased then said, Do you give Curtis a guinea, and take away the mare.” Curtis speaks, upon the nineteenth interrogatory, much to the same effect, “that when the deceased gave the mare to Fuzzey he was very jokey;—he told Fuzzey he had rather he had the mare than any one else, and asked him what he could afford to give for her, if he thought she was worth seven pounds; Fuzzey said, Yes, she was. Well then, said the deceased, give Curtis a guinea, and take away the mare; he remembers the deceased saying that he did not mind the mare being worked at the farm, but he could not let her go to posting work, as she had been a good mare, and he liked her.” Now, this is the latter end, as I stated, of 1812, and it proves any thing but incapacity;—here is mind and memory, and a knowledge of human nature;—here is a favourite old riding mare;—he will not keep her because she has done mischief;—he will not sell her to posting, he will not sell her to Fuzzey, as he might think himself at liberty to sell her again, or expose her to ill usage, but he gives her to the old coachman to be used on the farm, only requiring him to give a fee of a guinea to Curtis; and he is very jocose upon the occasion: certainly this does not show any loss of faculties. But Fuzzey goes on and says, “that about nine months afterwards he took the mare to Shawfield with some corn, and that the deceased acted in a very strange manner:—he says that he was not then paid as he commonly was;” here then was an instance of the deceased’s incapacity at that time;—he says, “that he went about three weeks afterwards to be paid;—the deceased did not appear to take such notice of him as usual;—when the deceased did understand, he went and fetched the money in bank notes, which he counted over twice, and then gave the deponent one note too much;” and he enters into some particular conversation as to that head, as an instance of more doubtful capacity;—that at first he did not know Fuzzey; when he did he went and fetched the money, and paid him a pound too much. That might happen from accident, or from a want of mind;—it shows a fluctuating state of mind. He says, “that sometimes the deceased appeared to have his recollection about him a good deal better than at other times, for he very well remembers that the deceased has more than once written a receipt for him to sign, and he has written it very correctly, and

the deceased seemed to recognize him when he came, and then again at other times there was no making him understand who he was, or what he came for; it was about the time of his brother's death that the deponent particularly observed that the deceased's memory failed him." But surely no intelligent person, who has been a careful observer of life, and I am sure no person who has been accustomed to proceedings in this Court, will be at a loss to account for these fluctuations in an old man, that sometimes he is intelligent, and sometimes not;—more especially where he is liable to special and particular attacks. He says, "that he remembers that the deceased appeared worse about, and for some time, perhaps nine or ten months after his brother's death; the deponent remembers that once or twice during that time, Mr. Kinleside paid the deponent, saying, that the governor was very poorly;—and after that, the two last times that ever the deceased had corn, he paid the deponent himself by draft on his bankers, which he wrote himself, for his eyesight was very good, and he wrote a clear strong hand, but some one, generally Mr. Kinleside, looked over the bill and draft to see that all was correct." He throws in here that Mr. Kinleside or some one stood by to see that all was correct, but he does not attempt to say that Mr. Kinleside interposed, or that there was any necessity for the deceased's receiving assistance; that all was not done by the deceased himself, certainly, without any assistance. Here then comes out from this very witness, direct proof that the deceased could conduct transactions of business correctly; that he could receive his bills for corn; that he could pay them by drafts upon his bankers, which he wrote himself; and that he went through the whole of the business correctly, without assistance. This witness is confirmed in this respect by others, though being produced in opposition to capacity, confirmation might not be necessary, but he is confirmed by a fellow-servant, Alexander, and also by the Rev. Mr. Walmesley, both of whom were present when some of these payments were made to Fuzzey. He is also confirmed by the draughts on the bankers, for here they are all filled up by the deceased, and here is the counter entry by the deceased in his own hand-writing; here are Fuzzey's bills and receipts, endorsed by the deceased himself, docketed on the back with the name of the person to whom paid, when paid, and the amount of the bill. They occur in January, March, June, and October, 1813, and February, May, and subsequent months in 1814, and therefore they occur at the periods most important to examine into as to the capacity of the deceased; here are also corresponding entries of the several payments made to Fuzzey in the deceased's own private book of accounts of his cash and expenditure, and the result therefore, of this evidence, in my judgment, proves a case quite different from that which was intended to be set up.

The next class of witnesses are three of the deceased's friends, who made occasional visits to him. The first of these is Mr. Matthew Harrison, the brother of the party in the cause, and he states in his deposition that he was acquainted with the deceased from his childhood, and he visited him on the 5th day of December, 1813; that he had seen him three or four times in the preceding twelve months; that on the 5th of December the deceased did not know him, and Mrs. Jukes was under the necessity of addressing the deceased, which she did, nearly in the following terms,—“Governor, don't you know that this is Mr. Matthew Harrison, and don't you know that he has a wife and children,

and don't you ask after his wife and children?" and that the deceased muttered something which the deponent did not distinctly hear, but which he understood to be, "I hope they are well," or to that effect: he said that Mrs. Jukes, again addressing the deceased, said, "I am sure you will be glad to hear that Mr. and Mrs. Ben Harrison and all the children are well at Guy's," upon which the deceased replied,—“I am glad to hear it,” in a muttering tone; the deponent staid with him about half an hour, but did not attempt to enter into conversation with the deceased;—he was not in a state of mind to converse on any subject;—that after the deponent's name had been mentioned, the deceased could not distinguish him from any other person, and did not, during the visit, recognise him as he had formerly done, and he well remembers, that during one half the visit he was in a sleeping state. Then he says, that he has not the least doubt that the deceased was of unsound mind, memory, and understanding, and that he was incapable, at that time, of making his will, or of doing any other act of a testamentary nature, or any act whatever requiring thought, judgment, and reflection, and I have no doubt this is Mr. Matthew Harrison's sincere opinion, and possibly it might be a correct opinion, that the deceased was not, during this half hour, capable of doing any act requiring thought, judgment, and reflection, because unquestionably he was sometimes in a state of incapacity.—It has, however, been pointed out to the notice of the Court, that upon this very 5th of December, the deceased writes a very rational and proper answer to a letter which he had received from Mr. Boodle;—the letter is exhibited:—“*Widmore, 5th of Dec. 1813, Dear Sir, the day you have fixed to be here with Mr. Stanley will be most convenient to me, and I hope Mr. Kinleside will be able to settle for the probate of the will. I remain, dear Sir, your's, sincerely, Andrews Harrison.*” It is addressed to “Edward Boodle, Esq. Brook-street, London,” and it is fairly written and properly addressed, and certainly, in this letter, there is no mark whatever of unsound understanding, or of want of thought and recollection, or of loss of memory; and when the Court recollects the object of this letter was to make an appointment with Mr. Boodle, for the purpose of making an alteration in the deceased's will, to the exclusion of Mr. Matthew Harrison's brother, the suggestion made by the counsel does not seem very improbable, that the deceased did feel unwilling to enter into familiar conversation with Mr. Matthew Harrison on this day, and that he would turn rather a deaf ear to this suggestion of Mrs. Jukes's, of enquiring after Mrs. Harrison and the children at Guy's, for he was a sincere moral man, and at the very time when he proposed utterly to exclude Mr. Benjamin Harrison from his testamentary bounty, he would not enter into conversation with the brother, or make inquiries after him. The other observation made by the counsel is still less matter of conjecture; it is a matter of necessary inference: Mr. Matthew Harrison had seen the deceased three or four times during the preceding twelve months;—now, when he only deposes to incapacity on the 5th of December, 1813, and he is specifically called on for that purpose, I think it is a just inference, that upon other occasions when he saw the deceased in that year, he did not observe any symptoms of incapacity. The excuse offered in answer is, that being the brother of the party, they did not choose to produce Mr. Matthew Harrison to the general incapacity;—that might be something of a reason for not producing him

at all; and in the allegation there does appear to be something of an unwillingness to vouch him by name, because in that article they do not plead it was Matthew Harrison who visited the deceased on the 5th day of December, but an old and intimate friend of the deceased: but, why, having produced him to incapacity on this day, and he having had other opportunities of seeing the deceased in 1812 and 1813, they should not have examined him to incapacity at the former periods in 1813, can be accounted for only by this, that he could not, with truth, depose that he did observe any symptom of incapacity. Taking his evidence, however, at the utmost, he only speaks to incapacity on this particular day during half an hour.

Mr. Gordon, another friend, who, I presume, was the deceased's successor in business, together with Mr. Stanley, is the next witness; his evidence goes no further than this; he says, "he used to visit the deceased once a year; his last visit was in June, 1813;—his memory had evidently become weakened from his great age, and, as the deponent believed, from a decay in nature, in the year 1812," which he afterwards corrects to 1813. The deponent introduced the subject of Mr. Benjamin Harrison having left Widmore, and that the deceased appeared very indifferent about it; he says, that in June, 1813, the decay of his memory and faculties had evidently increased, his mind wandered, he appeared lost at times in conversation: the deponent was with him seven or eight hours, and had a fair opportunity of observing his state; he does not remember any particular instances from which he made such observations respecting the deceased's faculties and memory, except as to his not being able to comprehend who some persons were of whom the deponent and Mrs. Jukes were talking." He says, upon the 5th interrogatory, that the deceased was for many years subject to nervous attacks; that he saw the deceased once in 1812, and once in 1813. Upon the 10th interrogatory, he says he does entertain considerable doubt of the deceased's being capable of the management of his affairs in 1813. He says, upon the 2nd interrogatory, "that meeting Mr. Matthew Harrison, soon after the deceased's death, he expressed a hope that his brother, the producent, was benefitted by deceased's will, who replied, no,—that a codicil had been made, whereby what was left to him had been taken away. The respondent said, he feared there had been some iniquitous proceeding, for he knew well what a regard the deceased and his brother had for the producent, and said, if his evidence was of use, he was welcome to call for it." He says, upon the 26th interrogatory, "he never heard any thing upon the subject of the deceased being displeased with the producent, except that there was a coolness between them, and that Mr. Kinleside was at the bottom of it, and had made some representations to the deceased to the prejudice of the producent."—Now, this gentleman ventures not only to indulge a suspicion of "*iniquitous proceedings*," but to suggest this suspicion to Mr. Matthew Harrison, the brother of Mr. Benjamin Harrison, upon no better grounds than the deceased's great regard for Mr. Benjamin Harrison; and yet this witness admits himself that he introduced Mr. Benjamin Harrison's name in conversation to the deceased, and that he appeared rather indifferent about it; he admits a coolness between the deceased and Mr. Benjamin Harrison; and he admits that he did not know that Mr. Benjamin Harrison had ever called upon the deceased after the month of June, 1812. I have not the least suspicion

that Mr. Gordon has given any thing more than his sincere opinion; but when a witness volunteers his evidence under prepossessions taken up on such foundations as these, the Court cannot give any very great weight to the force and effect of his mere opinion as to the state of the deceased.

Mr. Stanley had more opportunities of observing the deceased, and his is material evidence. He states that he had known the deceased from his childhood; his father was in partnership with him; he visited him "in the month of September, 1812; he remembers being at Widmore a few days after the codicil of the 2d of September was executed, and that he dined with the deceased and his brother; that in the course of the evening the deceased showed a want of recollection, and apparently a partial decay of his mental faculties, particularly of his memory, which at intervals he appeared to have lost:—several instances of it occurred in the course of the evening; in one instance he asked the witness how old his father was, though he had been dead sixteen years; another time he asked him about himself, inquiring how Mr. Stanley was, evidently forgetting the deponent, who sat next to him. On being corrected by the deponent the deceased's recollection returned, and he said, 'Oh, ah, to be sure,' just as if he had awoke from a dream. He says that he was not with the deceased sufficiently often to enable him to form a correct opinion as to whether the deceased was or was not, generally, capable of comprehending the state of his affairs; but he did observe, generally, from his manner, conduct, and conversation, that he was a good deal broken, and that his mind was going. The deponent did not see him again till after the death of his brother, when he went to Widmore to be present at the opening of the will, and to attend the funeral, and he saw the deceased three or four different days about that time; he does not remember particular instances of decay of faculties, or loss of memory, except as he is about to depose in answer to the next article; and yet he says, the deceased appeared to him to be much in the same state as he was before;—he was again with the deceased on the days of which he will more particularly depose, at which times the deceased was evidently worse. Those particular transactions it will be necessary for the Court to examine presently. He says, "that he was again with the deceased in September, 1814, when the deceased did not know him;" but, after Mrs. Jukes had explained who he was, by saying "Governor, don't you know your old friend, Mr. Stanley?" the deceased said, "Oh dear, is that Mr. Stanley? oh, yes, certainly I do," and the deceased did then appear to recognize him. He says, on the 5th interrogatory, that on one of the days to which he has deposed on his examination in chief, he remembers being present with the deceased, dining with him, when he was attacked with a sort of fit, which lasted only a few minutes;—he revived quickly, and he concludes with saying, "that he last saw him in September, 1815; that he was then no better;—he believes the deceased was not, from September, 1812, capable of comprehending the state of his affairs, or of managing the same." Now these terms, *capable of comprehending the state of his affairs, or of managing the same*, are still more wide and vague, and still afford a looser standard of capacity even than the usual terms which are made use of: they may stand at very wide distances indeed, but he does not, at the utmost, go beyond a fluctuating, doubtful capacity, and his conduct shows he did not conceive the deceased

reduced to utter childishness and incapacity; he says, on a further interrogatory, the 34th, "that the deceased was a co-executor with the respondent of his late brother, Mr. John Harrison. Mr. Boodle did attend the deceased at Widmore, in December, 1813, when he was sworn to his brother's will; the respondent does not recollect that Mr. Boodle did express any doubts of the deceased's capacity; the respondent and the deceased did meet some time in January, 1814, for the purpose of discharging several of the legacies bequeathed by his brother's will, and for the payment of some tradesmen's bills; the deceased did sign several drafts on the bankers for paying off those demands; he did all that he had to do correctly, which was merely to sign his name;—he could do any thing of that kind very well;—he could do what he was told to do, but he was not, as the respondent believes, of sound mind." It is a little extraordinary that he should transact all this business with a person who he thinks was not of sound mind; but the deceased shows no want of accuracy;—every thing he does, he does correctly and properly, without observation, without assistance;—he signs twenty drafts at least upon that morning, with Mr. Stanley, for the payment of the debts of his brother; and he does not merely sign his name, but it is "*Andrews Harrison, executor to John Harrison,*" that is the way in which every one of these drafts is signed;—he does not forget himself and not know what he is about, and Mr. Stanley does not suggest it was necessary to instruct him how he was to sign his name, and this is done twenty times together. Mr. Stanley, however, is of opinion, but it is mere opinion, that he could not do any thing more, and that he was still of unsound mind, possibly founding that opinion on some circumstances which happened afterwards in December and March, which I shall presently notice. Mr. Stanley settled his executorship accounts with the deceased, for in page 71 of the book, I find this entry, "September the 28th, 1814. To cash of Stanley, 267*l.* 10*s.* 2*d.* November, 1814. To balance of account of executors of J. H. 224*l.* 9*s.*" So that these sums must have been paid over to the deceased, and he regularly enters them in his book of accounts. Mr. Stanley again visits the deceased in September, 1815, and all he says then is, that he was no worse. On the death of the deceased, he is sworn as one of his executors by error, and was going to take probate of these codicils; nay, he becomes a party in this cause, and makes an affidavit as to scripts, and annexes these codicils as a part of the true will of the deceased. The counsel say, as an apology, that he was incautious in this respect; now, really, the Court cannot impute to him incaution, or that he had so slight a regard to the solemnity of an oath. I rather think he was sincere on both occasions, and that he swore to what he thought was true at the time of applying for probate, and at the time of the affidavit;—he had no idea at these times that the deceased was in such a state of incapacity as that instruments attested by respectable witnesses, were not the legal acts of the deceased. It is true, different impressions have arisen since in his mind, not perhaps confining himself to his own recollection of the facts within his knowledge, but by allowing his mind, as human infirmity is apt to do, to have an impression made on it by what he is told by others.

The three remaining witnesses are the three maid-servants of Mrs. Jukes, residing constantly in the same house with the deceased; those witnesses, therefore, had very good opportunities of judging of the ca-

capacity of the deceased, as far as such persons are capable of judging correctly; more especially Alexander who was Mrs. Jukes's lady's maid; and the counsel on both sides have relied on her evidence, as having been fairly given. She is produced by Mr. Benjamin Harrison, and there is no particular reason to believe that she is biassed in favour of Mr. Kinleside; indeed, I am to recollect, that Mr. Kinleside's situation having been such that his duty called on him to settle the accounts of Mr. John Harrison, and being his residuary legatee, having an interest to look accurately into those accounts, and other business of this sort, it is not difficult to account for his not being very popular in those two mansions among this class of persons; but Alexander appears to have given her evidence with great fairness. Her account deserves to be stated with some particularity;—she says, “she has lived with Mrs. Jukes twenty-three years; that for five or six years before his death, the deceased was subject to a kind of fit, though of what particular description it was, or what it should properly be called, she does not know;—when so attacked, the deceased would turn pale, and tremble very much;—he was apparently giddy, and at times quite insensible;—now and then, for some days after being so attacked, he did not know what he was about, but at all times when free from these attacks, he had his recollection about him, and was quite rational and sensible;—how frequently these fits came upon him she cannot recollect, but the attacks were more frequent about the time of his brother's death; she says, that if any thing worried or agitated him, he was more liable than at other times;—sometimes he had not a fit for several weeks together, at others more frequently, up to the last year of his life, when they increased upon him; he was worse about the time of his brother's death, and a good deal less collected than before or after; she says, that the deceased at times lost the recollection of his friends and acquaintance, which was not owing to his loss of eye-sight, for within a month of his death he read a newspaper quite distinctly, and without difficulty, aloud, and without spectacles;—she says, that sometimes she has thought that the deceased pretended not to know, and would not recollect people when he really did know them, she is fully persuaded that such was the case; at other times he certainly did not know them;—that the deceased did commonly pay what few bills he had himself, they were only for hay and corn, and such like; he kept his money up stairs, and when she took the bills to him, he used to examine them to see that they were right, and then went and fetched the money and paid the people himself;—the last bill he paid, which was Fuzzey's for corn, the deponent remembers his saying, he did not think he had money enough; Mrs. Jukes offered to lend him some; the deceased said no, he would go and see what he had, and finding he had enough, he came into the kitchen and paid Fuzzey. This was a few months before he died;—she believes, that excepting the particular times she has deposed to, the deceased never was entirely incapable, and then he would not be himself again for sometimes three or four days afterwards, at others he got over them much sooner.” She mentions another particular instance, “that she remembers within six months of his death, when she took her book of house-expenses to her mistress to settle with her, as she did once a week, and Mrs. Jukes had cast it up herself, she gave it to the deceased to cast for her, and he did so, and pointed out to the deponent a mistake she had made, and jokingly said she wanted to cheat her mistress;—

that though at times he was quite lost, yet his faculties had not failed him for a continuance." She also negatives the circumstance of his having lost his sense of delicacy and decency;—she explains the reason of a person being put to sleep in his room; which fact, however, of a person being put to sleep in his room, did not happen till a great many months after these codicils were made. These are a few of the passages of this witness's deposition, and they sufficiently show the general tenor of it. She is confirmed by the other female servants, Brown, the cook, and Stilwell, the house-keeper, who though they had not the same opportunity of judging of the deceased's capacity as the last witness, yet, as far as they had, they describe his capacity like Alexander; and that, except when under the influence of these fits, he was in the full possession of his capacity.

These are all the witnesses produced by Mr. Benjamin Harrison;—but there is one other witness who must not be passed over, William Taylor;—he was footman to Mrs. Jukes, and he had as good opportunities of judging as his fellow witnesses, Mrs. Alexander, and Brown, and Stilwell, but he gives a very different account of the state and condition of the deceased; it is stated in his evidence upon interrogatories, "he was footman to Mrs. Jukes from September, 1811, to August, 1815;—he now keeps a public-house at Wherwell; he says the deceased lived in the same house with Mrs. Jukes, during the whole time he was in her service;" he says upon the 2d interrogatory, "that early in the summer of 1812, he observed an alteration in the state of the deceased's mind and memory; it was about the time that Mr. Malin's difficulties occurred, which affected him very much, and he appeared to lose his memory, and his intellects grew weak;—that he was entirely incapable of recollecting those people who came to the house, unless told who they were;—that the deceased was incapable of understanding what passed;—that he required to be reminded what was to be done;—that he was quite forgetful and childish;—the deceased did not know what he was doing when he signed the codicil of 31st August and 2d September, 1812; the respondent put his name as a witness to those codicils, because he was desired to do so; that long before the brother's death, his memory failed him so that he could not play at cards, he thinks it was about the time of making the codicils;"—he goes on to state, upon the eleventh interrogatory, "that the deceased, for nearly two years prior to April, 1814, which is the date of the last codicil, was incapable of giving directions to the servants of the family, and that the deceased was, from that time down to the time when the respondent quitted Mrs. Jukes's service, treated as a person who had become quite childish and incapable of the management of his affairs;—upon the twelfth interrogatory he deposes, "that it was necessary, for the last three years, for Mrs. Jukes or some one to inform the deceased, who the different persons were who called, it was always done." These are some passages of his cross-examination;—they are sufficient to show that he deposes to a state of entire childishness, quite up to Mr. Harrison's plea;—this is certainly strong evidence, if it could be safely relied upon. The witness Alexander, upon her first interrogatory, says,— "that the first person that said any thing to her about being examined, was William Taylor;—that he came down to Widmore soon after the deceased was dead;—that he soon after came down again;—that the respondent found he had been with Mr. Benjamin Harrison;—that he

asked her a great many questions: the respondent said she could not remember many things that he spoke of, and he told her her memory was very bad; he said a great deal about the deceased's faculties, and about the deceased's behaviour." Here then we find this witness, immediately upon the death of the testator, quite active;—he goes down to Widmore, he then goes to Mr. Benjamin Harrison;—he goes down to Widmore again; he has a good deal of conversation with this material witness about the deceased, and about his faculties, and because Mrs. Alexander cannot recollect such facts as he thinks proper to suggest, he charges her with her memory being very bad;—it must have had a tendency at least, whatever the intention might have been, of exciting and tutoring this witness; his account of the state of the deceased is quite irreconcilable with the account of Mrs. Alexander, and those to whom the Court has adverted, and the Court must soon advert to others; he has not the same apology as the gardener and others who saw him only occasionally; this witness was constantly in the house with him;—acceding as I do to many of the observations made on his testimony by the counsel for Mr. Kinleside, I would further observe that though he is produced by Mr. Kinleside, he is rather, I think, in this part of his evidence, to be considered as the witness of Mr. Benjamin Harrison; Mr. Kinleside was under the necessity of producing him as an attesting witness to these codicils; he is only produced to the factum of these codicils, the factum of which, though he attested them, he has thought proper to deny; he is not only interrogated to the factum of these codicils, but he is interrogated to the whole case intended to be set up afterwards by Mr. Benjamin Harrison, and from his early communication with the party,—from the tenor of the interrogatories,—from the allegation which was afterwards given in,—(to parts of which no other witness than this witness has attempted to depose;)—I am led to infer, that the principal grounds of opposition to this case are founded upon information conveyed by this witness to Mr. Harrison, who we find so very active immediately after the death of the testator, and when these facts are deposed to, by being brought out upon leading interrogatories addressed to him, it being known beforehand what the witness could say, and those interrogatories not addressed to him for the purpose of extracting evidence from him which the party was unacquainted with, he is to be considered, I think, as Mr. Benjamin Harrison's witness, but without the adverse party having had the advantage of his being produced to those facts on Mr. Benjamin Harrison's allegation, and therefore he is a witness whom there was no opportunity of cross-examining, and in that point of view the Court is bound, I think, to make very considerable deduction from the evidence he has given, and when his description of the general state of the deceased is inconsistent with the other witnesses, who had the same opportunities of seeing the deceased, when it is at variance with Mr. Boodle himself as to the capacity upon the execution of this codicil, and upon some other parts of Mr. Boodle's evidence, and when he is directly at issue with some other respectable witnesses in the cause, he is a witness on whom the Court cannot rely; whether his evidence has arisen from some prepossession or bias in his mind, or some defect of intellect, or from whatever cause, without imputing to him an intention of really perjuring himself, I am not going too far in saying I cannot rely on any fact stated by him, where he is not corroborated by some other evidence.

There are several circumstances pleaded as inferring incapacity, which are either wholly disproved, or so explained as to change their character;—his losing his delicacy,—his getting up in the night,—and his undressing himself in the day;—but there are circumstances pleaded in the tenth article of the allegation, which it becomes my duty to examine, because it is certainly a very important part of the case, and that is, as to three interviews, which were had with the deceased by Mr. Boodle and two other persons, in the month of December, 1813, and one in March, 1814, upon which occasion the deceased was judged by all the persons present to be in a state unfit to proceed to a testamentary act:—the account given by Mr. Boodle of these meetings is to this effect;—upon the fifth and subsequent interrogatories, that, “On the 7th of December he went to Widmore, to the deceased’s house, accompanied by Mr. Stanley;—they there met Mr. Wells and Mrs. Jukes;—the respondent had determined to proceed cautiously, in consequence of a certain degree of want of recollection, which he thought he had observed in the deceased upon one or more of the occasions on which he had seen him shortly before, on the subject of his late brother’s affairs.” Mr. Boodle had been several times with the deceased, just at the time of his brother’s death, when it is admitted he was in a worse state than usual, but the utmost Mr. Boodle says here is, that he thought he had observed a certain degree of want of recollection in the deceased upon one or more of the occasions on which he had seen him; he says, “that after explaining to those present, the course he intended to pursue in taking the deceased’s instructions for some intended alterations in his will, the deponent took down from him, in the presence of Mr. Wells and Mr. Stanley, the testator’s own ideas of the property which he possessed, the dispositions he had made of it by his will and codicils as they then stood, and the alterations which he wished to make, but it being apparent to them all three that the deceased’s mind and memory were by no means in such a state as to enable him to make a clear and consistent disposition of his property, it was agreed by all that it would be proper to postpone the business, and an appointment was made for the following Tuesday. At this meeting the deceased certainly gave such evident proofs of a want of recollection, that the respondent had no doubt of his being in a state unfit to make any alteration in the existing testamentary disposition of his property;” he says, “that he was with the deceased upon the occasion now deposed of, not less than two hours;” here it is obvious that Mr. Boodle considered that the whole of the will and codicils was to be revised, that alterations were to be made in every part of them, and the deceased is left to find his way through them, and propose his alterations as he can. This might be quite proper and cautious; I am merely noticing the fact. He says, “that on the 10th of December Mr. Kinleside called upon him at his house in Brook-street, and said, that now finding by a comparison of Mr. Andrews and Mr. John Harrison’s wills, that they had been made in perfect unison, and with a mutual understanding between themselves, he thought that no alteration could properly take place, the respondent told him plainly, that was his opinion too; but it must be what Mr. Andrews Harrison himself should determine.” Here Mr. Boodle’s own opinion plainly is, that no alterations ought to be made in the will, but certainly he is not impressed with the permanency of the incapacity of Mr. Andrews Harrison at this time, for he says, that it must be what Mr. Andrews Harrison himself should determine.

Mr. Stanley states, upon the 32d interrogatory, that "Mr. Boodle did express to the respondent on his return home, that he felt himself peculiarly situated, with reference to the deceased, knowing as he did, that the wills of the two brothers had been made by them with a distinct understanding that no alteration should be made by the survivor, upon which point the deceased and his brother had been very anxious for many years: and the circumstances of the deceased's wishing, immediately after his brother's death, to make such alterations, excited in his mind a suspicion of the deceased's capacity, and of the possible influence of those about the deceased, and that he had therefore felt himself called upon to be very cautious in the steps which he took."—This is the account which Mr. Stanley gives of the conversation between himself and Mr. Boodle; but I think this is manifestly stated more strongly than Mr. Boodle himself meant to state it, or than he has stated it in his deposition in several respects, but more particularly in respect to this distinct understanding between the brothers, that no alteration should be made by the survivor, it only shows how cautious the Court should be upon all occasions in receiving evidence of mere declarations passing in conversation, which are so easily misapprehended, and which are so very liable, unintentionally, to be exaggerated and distorted from their true bearing; for Mr. Boodle, on the third interrogatory, thus states himself, "he does not remember any desire being expressed by both, of carrying each other's wishes into effect; though it might be implied by their-giving instructions jointly, as they did, and certainly a strong inclination was manifest in each to satisfy the other; he does not remember any wish being expressed, that the ultimate arrangements existing at the death of either, should not be varied by the survivor:"—surely then the inference drawn from their giving instructions together, and these affectionate brothers feeling a strong inclination to make their dispositions satisfactory to each other, is something far short of what Mr. Stanley apprehended, namely, that there was a distinct understanding between them, that the survivor should not make any alterations whatever; Mr. Boodle never so understood it, for he makes two alterations in the life-time of the brother, and when the brother did not make corresponding alterations, and they were pro tanto alterations when the brother was in a state of incapacity, and he makes two others when the brother was in a state not competent to do any testamentary act; but still it is quite clear Mr. Boodle goes down with an impression that no alteration ought to be made: and with an impression that the deceased's capacity might be in a doubtful state, and that there might be some influence exercised by those about the deceased. He says, "he went again to the deceased's house on the 14th of December with Mr. Stanley, and he read over with Mr. Andrews Harrison, the whole of his existing will of 1808, and the several codicils thereto, taking down the deceased's own ideas of the alterations he was to make; and the various instances of want of memory which occurred in the course of taking them down, proved to their mutual conviction, that although much better in that respect than at their last meeting, he was still unfit to make any consistent disposition of his property. He states further, that on the 19th of March following, he received a letter from the deceased, desiring him to come to Widmore on the following Monday, for the purpose of making a codicil to his will; the respondent wrote to the deceased that he proposed attending him; circumstances preventing his

going there upon the Monday, (both the letters are exhibited in this case) he went there on Tuesday the 22d of March, and endeavoured again to take instructions from the deceased, for the proposed alterations in his will, taking down a list of names of legatees under his existing will, specifying such as the deceased conceived to be dead, and afterwards endeavouring to learn from him, what legacies he then meant to leave: but after two hour's close attention to all he said, and taking down his intentions as far as they could be at all made out, his instructions were so incoherent and so inconsistent with his former deliberate and well considered intentions, that not only Mr. Stanley and the respondent, but even Mrs. Jukes, who had shown great anxiety to have some of his intentions carried into effect, agreed that he was by no means in a state of mind, memory, or understanding, competent to make any new disposition of his property; the respondent therefore returned to London, under an engagement to come again to Widmore whenever Mrs. Jukes should find him to be in a disposing state of mind and intellect; he states further, "that he remembers, that on the second visit Mr. Wells did express an opinion that it was unnecessary to go through the will as it confused the deceased, and he wished to confine the deceased more immediately to the devise of the real estate, to which suggestion the respondent did not feel himself at liberty to agree: upon the last of the three interviews of which he has herein deposed, the deceased had his existing will before him, which he read himself, making his own remarks on each particular legacy and appointment as he proceeded; the observations which he so made being taken down in writing by the respondent." Upon the tenth interrogatory he says "the deceased was composed, he showed no irritation, except that whenever the name of Mr. Benjamin Harrison was mentioned or occurred, he spoke with more quickness than belonged to him." To the 11th interrogatory he says, "that from the observation he made, he considered, and still does consider, that it was not so much a decay of understanding as of memory which the deceased manifested; he says "that the deceased was quite rational, but where memory was concerned very deficient. The respondent cannot take upon himself to say the deceased was permanently incapable." Upon the 12th interrogatory he says "it was apparent to him, that the deceased's mind was upon all three occasions of which he has deposed, strongly impressed with a feeling against Mr. Benjamin Harrison, and he showed a great anxiety to make alterations of those bequests which related to him, in some degree also towards Mr. Paul Malin; when the respondent was with the deceased in 1812, the deceased expressed great concern at Mr. Benjamin Harrison having declined to be his executor; but he did not then show any such feeling of irritation as existed subsequently, and how that had arisen the respondent does not know."

At present I am only considering how this evidence bears on the question of capacity: how it is to bear either on volition, or on fraud, or circumvention, belongs to another part of the case.—Mr. Boodle goes down with strong prepossessions against any alterations being made, and with unfavourable impressions in other respects as to the state of the deceased: on the two first occasions he thought the deceased wished to make an entire new will, and the deceased attempted to go through the whole of this long and complicated disposition contained in his will and codicils: on the third interview also, though the deceased

had mentioned in his note, which is not exhibited, "I wish to make a codicil," yet the same course is still pursued of going through the whole of the testamentary dispositions; the deceased becomes confused, and though, as Mr. Boodle says, he was quite rational, yet he showed strong marks of want of memory; and, therefore, Mr. Boodle declined proceeding. He and Mr. Wells differ in their opinion in respect to the course which ought to have taken place on this occasion; the Court is not called on to decide that point between them: In Mr Boodle's view of the subject, and as things appeared to him, knowing only so much as he did of the state of mind of the deceased, the course he pursued might be quite correct; at all events his conduct was perfectly cautious; and, without doubt, was highly honourable. The Court is only considering how these transactions ought to bear out the general capacity of the deceased, and really, under such circumstances as have occurred, the deceased becoming confused, and showing marks of defective recollection, a person of his great age, subject to nervous fits, which were liable to be brought on while his mind was anxious and agitated, these transactions, though they are extremely important in considering a question of general capacity, are, in my judgment, by no means conclusive; at other times, and under different circumstances, and the deceased attempting a less extensive arrangement, he might not be confused, but might recollect all circumstances connected with, and necessary to give effect to testamentary acts of a less complex sort; for, as Mr. Boodle observes, his understanding was not defective; he is quite rational, it is only defect of recollection that is imputed to him, and Mr. Boodle does not venture to say he was impressed with an idea of his being permanently incapable; on the contrary, at the last interview he proposes attending again if it should be necessary.

It is proper now to compare this with the other evidence, to see whether at these interviews the deceased was in his general and ordinary state, or whether he was seen under circumstances of disadvantage and confusion, and defective recollection, which did not exist at other times: for this purpose it may be right now to advert to some of the evidence produced by Mr. Kinleside in support of the general capacity; for hitherto the Court has only examined the evidence produced by Mr. Benjamin Harrison in support of his case.

Mrs. Jukes, the old lady in whose house the deceased lived for so many years, has been examined: she had undoubtedly the very best opportunities of observing the state of the deceased's mind, being constantly in his society; at the same time she is very old, she is eighty years of age at the time of the examination, and is certainly subject to some lapses of memory: she has undergone one of the longest examinations ever taken in this Court, first on a very long allegation, and then on upwards of forty interrogatories: but I see no reason to suppose she does not relate what she recollects truly and with integrity, and her account is this:—"she was acquainted with the deceased for nearly sixty years; he came to reside with her about the year 1789, and continued to reside with her till his death; for several years before his death, he was subject to a nervous attack, which was sometimes like a fit: she remembers that the deceased was first attacked with the nervous complaint, of which she is now deposing, several years before his death, in a slight degree, they then lasted only for a little while; their effect was to confuse him, and he did not know where he was or what he was

about; sometimes they would go off in a little while, at other times the nervous affection would continue upon him for some days: as he advanced in years the attacks came on more violently, and assumed a different appearance, being more like fits, but they were uncertain both as to their recurrence and duration; if any thing happened to agitate him, it would bring on the nervous attack, but generally they came on without previous notice or warning. Within the last two years, the last of all more particularly, the attacks were more violent, and more frequent too, than they had been before, but she thinks, that when they became more violent they were sooner over, that at all times during 1812, 1813, and 1814, and almost to the very time of his death, the deceased retained his mental faculties, and excepting those times when he was suffering under the attacks to which she has deposed, or the effects of such attacks, he was of perfectly sound mind and understanding; his memory was so far affected by the repeated nervous attacks, that he did not remember persons whom he was not accustomed to see, till he was told who they were; otherwise his knowledge and recollection of persons, particularly those about him, were good; he was so deaf, that the deponent's voice being weak, she could not converse much with him, but whenever he did join in conversation, he conversed very rationally and sensibly, and with great good humour, for he was a very sensible man, and remarkably cheerful, though very calm. It was his constant habit to read to her the psalms of the day, and lessons, unless prevented by visitors or illness; now and then he was fond of a little fun, if he came to any passage that reflected upon women, he would be humorous upon it; he was capable of comprehending the state of his affairs, and fully capable of managing them to the last, always paying his own bills, and regularly entering in his account book all the payments he made; but he did this principally in his own room, though he made no secret about any thing; the deceased used to assist the deponent in keeping her accounts, in which he now and then discovered a mistake, and that he was always capable, except when under the influence of his nervous complaint, of settling any accounts whatever without assistance, or of doing any act requiring thought, judgment, and reflection; that neither she herself, nor any other person, thought of treating him otherwise than as a person who was very capable; he would have been offended, and properly so, if they had done otherwise." This is the substance of the old lady's account;—and it very much corresponds with the account of the maid-servant Alexander; and is confirmed by other respectable witnesses.

The next person to whom I shall advert, who is considered on both sides an important witness, is a medical attendant and friend of the deceased, Mr. Roberts; he states "that he attended the deceased during the year 1812, sometimes as often as three or four times a week; he continued to visit him pretty regularly down to the month of October, 1814; he was then absent till the beginning of December, when his visits were renewed, and continued till the end of the year 1815: the deceased was at all times very friendly with the deponent, who, independent of professional attendance, was living in habits of friendship with him, and from the frequency and length of his visits, he acquired an accurate knowledge of the state of the deceased's body and mind; that in consequence of a peculiar habit of body, he was liable to an occasional interruption of his mental faculties; the attack came on without previous no-

tice, and at no particular or stated periods; he has seen the deceased frequently when under the influence of such attacks, the effect of which was to produce a total suspension of his mental powers; excepting upon these occasions the deceased was at all times in the years 1812, 1813, and 1814, and as long as he continued to see him, of sound mind, memory, and understanding, and had apparently a perfect knowledge and recollection of his friends and acquaintance; he was capable of understanding what passed in conversation, and did at all times converse with the deponent and others in his presence, in a very rational manner.” An hypothesis has been attempted to be constructed upon the evidence of this witness, that these fits had no effect upon the deceased’s mind except when they were visibly present, producing this total sort of suspension of faculty, but that neither before nor after; and that therefore, unless the mental powers of the deceased were wholly suspended, the deceased was in his ordinary state. Now I cannot but think that what I have just stated from this evidence, is the sound result of Mr. Roberts’ evidence; and that he by no means intends to give any other opinion; and if he did, it would be at variance with all the other evidence in the cause. No doubt his faculties were affected at the approach of a fit, and perhaps still more after it was over; sometimes it did not come to a fit, and yet he was affected, it being kept off by the medicine;—he took valerian;—and it continued for some time in a greater or less degree. The witness goes on to say, “he was fond at times of an innocent joke; he says, also, he has gone into the room occasionally in the morning when the deceased was reading in the bible or prayer-book, and he did not leave off reading immediately, but read aloud to the end of the chapter, or some verse where he could conveniently stop.” All these facts speak for themselves. There is another part of his evidence, however, which is deserving of still more attention; for it relates to the deceased’s capacity for business. He says, that every year the deceased was in the habit of desiring the deponent to send in his account to the close of the year; the deponent accordingly did so, charging to the deceased the medicine which he had supplied; and within a few days after the deponent always received from the deceased an envelope, addressed by him, containing the account which had been rendered, at the foot of which the deceased had added such a sum as he thought proper for the deponent’s visits, which were never charged in the account. The two sums were cast up by the deceased, always making an even sum; for which amount he enclosed sometimes bank-notes, at other times a draft on his bankers, filled up, and signed by him. The deceased either delivered it to the deponent if he happened to call, on which occasions he verbally requested the deponent to send him a stamped receipt at his leisure;—if he did not see the deponent, the envelope was left at the deponent’s house.” He goes on to state, “that excepting when suffering from the nervous attacks, the deponent never witnessed in the deceased a want of thought, judgment, or reflection.” He states another particular circumstance;—“that he remembers having played at whist with the deceased on the 29th of September, 1814,” that is, long after the last codicil;—“that he played with him both before and after that time;—but that is the only date to which he can depose. He played on that occasion against the deceased, and for money; the deceased had a perfect recollection of every point of the game, and played remarkably well;—and he concludes by stating, that during the last six or eight months before his death the

deceased's mind appeared to be less firm than it had been, and it appeared to have given way."

Now, in regard to what this witness says respecting the payment of his bills, the books of account have been referred to, and some observations have been made upon them in the argument. No. 117 is the bill which the deceased paid Mr. Roberts in January, 1813, and the account given by this witness of the mode of payment is to be recollected. The bill is paid in January, and here is a receipt to the bill, dated January 14th.—"Bromley, January 14th, 1813.—Received of Andrews Harrison, Esquire, the sum of thirty-five pounds, by payment of Mr. Paul Malin, for medicines and attendance to the 31st of December, 1813, for self and partner.—William Roberts." And it is inferred from the circumstance of its being stated in the receipt to have been paid by the hands of Mr. Paul Malin, that it was not the deceased that settled this account, but that it was Mr. Paul Malin. Now Mr. Malin at that time kept the deceased's cash. Mr. Roberts says, that he sometimes received payment in bank notes, and sometimes in a draft upon the banker. Of course, if the deceased drew a draft, it would be a draft on Mr. Malin; probably he might be directed to pay it in money. It is charged in Mr. Malin's account of January, 1814; it certainly therefore was paid by him; and as Mr. Malin had got into difficulties, the deceased might desire it should be inserted in the receipt, "paid by the hands of Mr. Malin;" but I think there is nothing which proves the bill was not settled by the deceased himself in the manner stated by the witness. In the first place here is a sum added to the bottom for attendances; the bill is £29. 14s. 9d.; here is 5l. 5s. 3d. added, making 35l.; the bill is endorsed "Roberts and Ilott, 12th January, 1813, 35l." In the deceased's own hand-writing in the account-book, upon the 12th of January, 1813, is the entry for the 35l. paid to Roberts and Ilott; in Mr. Malin's account current, here is upon the 12th of January, 1813, 35l. to Roberts and Ilott. Now, all these entries being upon the 12th of January, I am led to conclude that the transaction between the deceased and Mr. Roberts was conducted upon that day, and that he then gave a draft to Mr. Roberts upon Mr. Malin; for Mr. Malin's receipt is not dated till two days afterwards; it is dated January the 14th; and therefore that perfectly accords with the drafts being drawn on January the 12th. Mr. Malin in his account enters it on that day; the receipt is not given till the 14th, which is the date when the draft was presented for payment, or when Mr. Malin was directed to call on him and pay him. But this is not the only transaction of the kind; here is a similar one in the next year, and which is a still more important period of time. January, 1814, here is Mr. Roberts's bill for that year 27l. 12s. 10d.; the deceased in his own hand-writing thus adds to it 5l. 7s. 2d. the two making together the even sum of 33l.;—here is Mr. Roberts's receipt for this sum;—here is on the back of the receipt, in the deceased's own hand-writing, "Roberts and Ilott, 15th January, 1814, 33l.;" and in the deceased's cash-book here is "by Roberts and Ilott 33l.;"—but here is still more, for here is the draft drawn and filled up by the deceased himself upon his new bankers, Martin, Stone, and Company, for this 33l.; here is the corresponding part of the check filled up by him for this sum of money, so that here are these transactions of business completed in all their parts, and at most important periods of time, proved by the clearest evidence, by the oral testimony of Mr. Roberts,

without adverting to the exhibits, and by the exhibits brought in and admitted to be in the deceased's own hand-writing. Now, that a man who can do all this, and yet from imbecility of mind can do no testamentary act, however cautiously conducted, and however free from suspicion of fraud, is, I think, quite untenable.

The next witness is Mr. Wells. He was an intimate friend of the deceased, and the account which he gives of him is to this effect; that he was intimately acquainted with the deceased many years; who had a key of deponent's shrubbery, and used very frequently to walk therein; he frequently also came to deponent's house, and after the death of Mr. John Harrison, the deponent frequently dined with the deceased at Shawfield, and the deceased also dined with the deponent at Bickley, which intercourse continued till the deceased's death, but was less frequent during the last six or twelve months of his life. The deceased's mental faculties were then on the decline, and during that period the presence of the deponent brought back to the deceased's recollection those happy periods of his life when the deponent's father and uncle were living, and the deceased used to lament that those days were gone, and was affected by it. The deceased for many years was subject to nervous attacks, which were attended with a temporary loss of memory; sometimes the attacks lasted only for a few minutes, at other times they continued longer, and except when suffering under those attacks, he believed him to be of perfectly sound mind, memory, and understanding as perfectly as any man of his age whom the deponent ever saw; he had a perfect knowledge and recollection of his friends and acquaintance, and of those about him. About the time of Mr. Malin's failure the deceased sent for the deponent to speak to him upon the subject of his affairs, when he found that the deceased fully comprehended the state of them, and from what then passed he has no doubt he was fully capable of managing them; he showed to the deponent the cash-account of Mr. Malin, which the deceased appeared to have balanced very regularly. He had no doubt the deceased was capable of settling bills, keeping his accounts, and managing his own affairs, without any assistance, or doing any act requiring thought, judgment, and reflection. He has been present when Mrs. Jukes has unnecessarily interfered to explain what she supposed the deceased not to have heard, and the deceased showed some impatience at her interference. He goes on to state, "that the deponent was requested by the deceased to be present at the opening of his brother's will; he then met the deceased for the first time after his brother's death; on seeing the deponent the deceased held up his hands, and expressed the greatest concern at the loss of his brother; he seemed to be in great distress, and said that he had lost his all."

The case set up is, that the deceased was so reduced to a state of second childhood, that he was perfectly unimpressed by the death of his brother, whereas it appears from this and a great deal of other evidence, that the deceased was most exceedingly oppressed and distressed by the death of his brother, and felt it most deeply. As to his playing at cards before the funeral, which was dwelt on at the bar, I confess, considering his state at the time, his deafness, and so on, and that cards were his usual amusement, it does not show any want of memory, or any want of capacity, that he should wish, or that his friends should press him to play at cards at that time; it was a mere substitute for conversation, to which he was almost obliged to resort. As to his capacity for

playing at cards, Mr. Wells says, "he did not consider him incompetent till within the last six months of his life, during which time he did not play with him; and, therefore, he cannot depose to his competency or incompetency; but he played with him within the last twelve months of his life, when it was the observation of the deponent's nephew, as well as himself, that the deceased played remarkably well: whether they then played for money or not he does not particularly remember, but he believes they did, and certainly the deceased was then fully competent to play for money."

In addition to this there is the evidence of the Rev. Mr. Walmsley, who was acquainted for 30 years with the deceased. He lived on terms of intimacy with him down to the time of his death. He saw him frequently while he resided at Chislehurst, which was till 1805, when he removed to London, and used, though more seldom, to see the deceased afterwards; and during the years 1812, 1813, 1814, and 1815, he, upon the average, visited the deceased, once a month: when so visiting, he almost always slept one night at Widmore; he had, therefore, frequent and very full opportunities of judging of the capacity of the deceased, a person quite as capable of judging, perhaps, as the witness, William Taylor; but he relates facts which give the Court an opportunity of judging for itself. He says, "that the deceased occasionally, when the deponent was obliged to be in London early in the morning, sent him in his own carriage, and upon such occasion the deponent having mentioned such his intention to the deceased, when he arrived at Widmore in the morning or before dinner, the deceased recollected it, and at the usual time in the evening, perhaps about eight or nine o'clock, he of his own accord gave orders to his coachman to be ready the next morning to take the deponent to London at the time required;" (now that shows understanding and forethought on the part of the deceased;) "and the deceased was very exact and particular in the directions which he so gave. The last time this occurred was, according to the best of his recollection and belief, within the last six months of his life." (This is the person whom Taylor would represent as utterly incapable of giving any order whatever to any servant.) He says, "that the deceased was subject to nervous attacks, which were attended with a total abstraction of thought, and suspension of his mental faculties; the attacks he witnessed never lasted longer than from ten to twenty minutes, and when they subsided, the deceased's faculties and recollection returned, and within an hour afterwards he was entirely himself again; that, excepting when under the influence of one of those attacks, the deceased was at all times, during the years 1812, 1813, and 1814, of sound mind, memory, and understanding; but he thinks that the deceased's faculties were not so strong during the last year of his life as they had been before, but he does not think they were materially impaired; that he had a perfect knowledge and recollection of his friends and acquaintance, and of those about him, except when under the influence of the before mentioned attacks, during the last year of his life; not many months before his death, the deceased having seen the deponent from a window which looked down the road, as he approached the house, came out to receive him, and began immediately to converse in his accustomed good humoured and jocular manner; the deponent has gone into the room, and found the deceased reading the psalms and scripture lessons for the day, and he has heard him

make remarks upon them which were both pertinent and sensible." He is stated by some of the witnesses to have read remarkably well, which could hardly be the case with a man who was reduced to childhood; and Stilwell says, he was accustomed to look out the psalms of the day himself, without assistance. Mr. Walmsley goes on to say, that within the last year or two of the deceased's life, he has been present when his coachman came in to settle his account with the deceased; the deceased looked over the articles, cast up the account, and paid it, without any assistance, and as far as the deponent observed, without difficulty. He states, that upon another occasion, a farmer, Fuzzey, brought his bill for corn; the farmer was called into the parlour, and the deponent is pretty certain that the deceased paid him at the time without assistance. He says that the deceased was certainly, in the deponent's opinion, at all times, when not under the influence of fits, fully capable of settling all such accounts, and paying his bills, without any assistance whatever, and was fully capable of doing any act requiring thought, judgment, or reflection.

It might be unnecessary to add to this, but even the witnesses produced on the condidit on their first examination, Mr. Ilott and Dr. Smith, confirm it. Mr. Ilott was acquainted with the deceased for eleven years, and he says, that during the last three or four years he attended the deceased almost entirely, and was in the habit of calling on him every second day; so that he had very frequent opportunities of seeing him; and he says, on the second interrogatory, "that there was occasionally an absence of memory in the deceased, but that in general the deceased's memory and understanding were unimpaired during the two years before May, 1814." He says to the third interrogatory, "the deceased did not uniformly converse so as to satisfy the respondent that he was in complete possession of his mental faculties; there were times when he did not recollect the respondent—about five or six in number." So that in the course of three or four years calling upon the deceased three or four times a-week, there were four or five times, that is, not once in fifty times, in which the deceased did not recollect the deponent, which perfectly accords with Mr. Robert's account of those attacks. He says, on the 6th interrogatory, "that he has heard it said, that the deceased had become imbecile, and was incapable of managing his affairs, for some years before his death; but the respondent paid no attention to such report, because he knew the contrary to be the fact."

The Rev. Dr. Smith, who is the clergyman of the parish, who has known the deceased for above thirty years, says, "he was not in the habit of visiting the deceased for the last four or five years, previous to his death, but he called upon him occasionally. He remembers, after the 27th of April, 1814, meeting the deceased at dinner at producent's, they played at whist together in the evening; the respondent and the deceased were partners, they played two rubbers, and the deceased played as good a game as ever;—he was as perfectly in his senses as any man; this was about a year, he says, before his death;" that was long after the last of these codicils. Dr. Smith plays with him, Mr. Roberts plays against him; Mr. Wells and his nephew are by-standers, seeing him play at whist, and think him a remarkably good player, and to suppose a man under these circumstances is so reduced to childhood, so lost to every thing he does, as not to be capable to do any testamen-

tary act whatever, is really a situation we cannot very well consider as existing.

Now these are the leading features of the depositions of the witnesses, and the result is quite obvious; they disprove the case set up of total incapacity. But to rebut the averment which was made, that the deceased was unable to manage his own affairs, and to pay his own bills, and to settle any accounts, his own papers have been exhibited in the cause, and some of them (perhaps sufficient) have been already adverted to by the Court. Now here, in the first place is the fact, that the deceased did manage his own affairs; that no other person is proved to have assumed that authority over them for him. Mr. Malin, first, and Mr. Kinleside afterwards, did overlook his brother's, Mr. John Harrison's accounts, the deceased only supplying money; but the deceased, down to a very late period of his life, kept his own private accounts, paid his own bills, drew his own drafts; no evidence is produced to prove he did not do all these things himself: he might occasionally have a draft filled up by a friend who was with him, Mr. Kinleside or any other person; but nothing further is proved. Here is in several instances proof coming out incidentally, that he did the whole himself, without assistance.

It was quite unnecessary, in my judgment, to examine further witnesses upon this point? the documents being in the hand-writing of the deceased, they are his accounts; and it lay on the other side to show they were not kept by him, but by another person for him. One small part of the account-book, and one small part only, during the latter part of the year 1812, has been attacked in argument. As to many of the objections, the Court was satisfied, at the time, that they were unfounded; some indeed were given up, others were adhered to; but upon looking carefully into the accounts since, as far as a person not conversant with these matters may venture to trust himself, I think most or all of the objections are of little weight or erroneous. There are a few false castings up, and who does not make blunders of this kind? there are two entries of the same thing, one of which is afterwards erased; that has occurred in former years; things are entered on one side that should be on the other, but again, that species of mistake occurs in former years. There are great errors in page 49. Here is a deficiency of cash 149*l.*, I think, in the year 1810, and in the year 1809 a deficiency of cash, making a difference of 125*l.* Who does not occasionally omit entries of expenditure? but this is in 1809, when his capacity is unimpeached: there is in 1810 a deficiency of 105*l.* 6*s.* 7*d.*; little omissions of that kind occur in the former part of his life.

The great circumstance relied on in the argument was, that there is quite a change in the principle of keeping the account, occurring about the middle of 1812, which can only be accounted for by the deceased's being incapable on account of Mr. Malin no longer assisting him in keeping his accounts:—it is stated, that one side of the account contains all his sources of income; and the other all his expenditure; and that he has entered sources of income twice over. Now, the objection is not quite correct in point of fact; in his private accounts the mode in which he carries them on is this:—he brings forward his balance from the last year, and he includes in it, not merely cash in his own possession, but cash in his banker's hands also; and he debits his private account with the aggregate jointly, and then he goes on to debit the cash with the di-

vidends his bankers from time to time receive. In this year, till September 17th, it goes on in that mode,—but then he adopts a different mode, and from thence to the end of the year, and the beginning of the following year, when he transfers his account to the new bankers; he proceeds in a different way, for he debits cash, with monies paid by, or received from Mr. Malin: but he does not debit it with the dividends Mr. Malin receives, but finally with the balance paid to the new bankers by Mr. Malin. Is there nothing to account for this but the incapacity of the deceased? This was the time that Mr. Malin had fallen into his difficulties; when the deceased did not know what money he should get from him. It begins on the 17th Sept.: the monthly account for September is in a different hand-writing, and then from that time to the time of appointing his new bankers, he only debits cash, as I have already stated, with the sums which Mr. Malin had actually paid for him. It is a mistake of the counsel to suppose that he debited the things twice over; the dividends are not debited—indeed the dividends on the April payments, 117*l.* were not debited at all; the dividends due at Michaelmas on Long Annuities, the dividends due at Christmas, on the 3 per cents. are not debited in the cash account, but only what Mr. Malin pays for him, and the money which he finally pays over to the bankers: he, therefore, does not do it twice over, and I think, considering the difficulties into which Mr. Malin had fallen, the deceased, instead of considering his money as cash, as the dividends should arise, was right in only considering it in the way I have already stated; if the deceased was in error in this respect, it is an error not very unnatural, and which persons, I hope, in their senses may fall into: for it appears to me the proper course for a man under those circumstances to have adopted. I will not debit the account with the sum in my banker's hands, which I may not receive on account of his difficulties; but I will debit the account with the money as it is received from him.—It was said he does not balance his account at the end of the year. No, he did not, because, at the end of the year, Mr. Malin had not settled his account with him. He renders the account for January and pays over the balance to Martin, Stone, and Co.; but when he settles his final account with Mr. Malin, and the balance is paid over to the new bankers, he debits his cash account with that balance, and he goes on from that time to the time of his death in the same way: in addition to this balance, the dividends as they are from time to time received, first, his own dividends, and afterwards the dividends of the residue of his brother. Perhaps after this observation it will be quite unnecessary to advert to trivial circumstances, but there are many minute circumstances in these accounts which impress one with exactly the same sort of conviction, that the deceased completely understood them. In the January account there are two balances paid to Martin, Stone, and Martin, one on the 15th of January, 113*l.* 14*s.* 8*d.*; the other on the 28th of January, 305*l.* 18*s.* 6*d.* making together 419*l.* 13*s.* 2*d.*; the deceased, in transferring this into his private cash account from Malin's account, does not enter them separately, as a mere copyist would do, but he enters the 419*l.* 13*s.* 2*d.* in one sum, as commencing the new account with his bankers, and then, from time to time, he enters his dividends.

Now these accounts, with the bills regularly paid and indorsed, these drafts drawn, these counter checks registered and marked with the date and sum for which they were drawn, the corresponding entries in the

book of expenditure, prove mind and understanding, and thought, judgment, and reflection very strongly; and in a person of his great age of a most extraordinary and unusual degree.

The instrumentary evidence does not conclude here; there are several letters written by the deceased himself, some at very important periods, which have been exhibited, and one or two of them have been already noticed. I will only mention the others, because they are not liable to the insinuations made against the accounts. Here is a letter of the 10th of February, 1814, addressed to Mr. Kinleside; and, therefore, it could not have been written with his assistance: "*Dear Kinleside,—I have received yours this morning. Mrs. Jukes continues much the same. I shall send the carriage for you to Sutton, and hope you will bring Mr. Perry with you. I have not time to add more. Yours, most affectionately, Andrews Harrison.*" Addressed to "*The Reverend Mr. Kinleside, Angmering Parsonage, near Arundel, Sussex:*" and with a post-mark upon it. No person could write a more proper letter.

"Widmore, 12th February, 1814.

"Dear Sir, Mrs. Jukes has received your letter this morning, but being confined to her bed with a bilious fever"—(and, therefore, she could not assist in this letter)—"*cannot have the pleasure of receiving her*"—(meaning Mrs. Kinleside, I presume)—"*at the time proposed, but hope to have the satisfaction of seeing you at that time, as my affairs require your assistance. You may depend on the sending the chariot as usual to Sutton. I am most sincerely your's, Andrews Harrison.*" Addressed like the former.

Another letter, dated 3rd of March, 1814, coming nearer to the time of this latter codicil, is also addressed to Mr. Kinleside, "*Bromley, 3rd March, 1814. Dear Sir, Joseph shall be with you at Sutton, with the horses only, on Monday, and I shall be happy to see you with Mrs. Kinleside, when I hope you, with Mr. Stanley, will be able to settle the executorship business. We have not yet fixed on the time for removing to the other house.*" It is proved that it was intended by him to go to Shawfield, but that intention was afterwards given up. "*We have not yet fixed on the time for removing to the other house, but shall wait till we have the pleasure of seeing you, and hope you will meet with a supply for Sunday,*" a supply for his church he means.

Another letter of the same date, is to Mr. Roe, who resided at Workshop, in Nottinghamshire, and was a devisee of the property the deceased had in that quarter of the kingdom:—"Bromley, 3rd of March, 1814. *Dear Sir, I am much obliged to your father for his kind present of forest mutton, which was received safe, and at the same time informed me of his enjoying good health, which I sincerely hope may long continue, as well as that of your mother's and brother's, to whom I send my kind compliments. I have lately suffered in a most severe loss by the death of my brother, whom I sincerely loved, and shall ever regret.*" This is a gentleman who is so great a child, that he has forgot his brother is dead, and has no impression of the loss he has sustained. "*I observe that you have felt the late inclement season. I never remember such a fall of snow, and the frost has continued to this day. My best wishes for the happiness of yourself and family, I remain yours, most sincerely, Andrews Harrison.*"

Another letter on the 23rd of January, 1815, is addressed also to Mr. Richard Roe. "*Dear Sir, I am very much obliged to your father for*

the very fine mutton which he has been so kind to present me with, which arrived safe on Tuesday last. I beg you and father, with all the family, will accept of my sincere and most friendly wishes that you may long enjoy many happy returns of this season. I am, dear Sir, your sincere friend and humble servant, Andrews Harrison."

These are the documentary parts of the evidence; and what is the result to be drawn from them in respect to general capacity? Why, that the deceased was very far advanced in life, was subject to occasional nervous attacks, which might lead ignorant or prejudiced observers to mistake or distort his condition to that of general incapacity, which might mislead occasional visitors, or those who had only a few opportunities of seeing the testator, to the same conclusion;—which might expose the deceased, when he was agitated, and anxious and nervous, and attempted some complicated business, to become confused, and his memory to fail him; but in his general and ordinary state, it is proved to my satisfaction that he possessed his mental faculties in an extraordinary degree considering his great age, and that he had a testamentary capacity quite equal to a testamentary act of no very complicated nature.

Still the infirmities of great old age, the deceased being subject to these attacks, and these codicils altering a will very deliberately made, it is necessary, where undue incitement and circumvention are imputed, to look with vigilance into the acts themselves.

The two first codicils, that of the 31st of August and the 2d of September, 1812, may be considered together as in truth constituting one instrument, and the principal witness to this is the cautious and respectable witness, Mr. Edward Boodle; and the account which he gives is this:—"that he attended the deceased by appointment on the 31st of August, 1812; he cannot, from recollection, depose with certainty who were present; he believes Mr. Trevillian was present; the deponent remembers generally that the deceased told him he wished to make a codicil to his will; he stated also that there were some pictures and books, which he had received from a relation of Mr. Trevillian, and which he felt himself under a promise or obligation to leave to Mr. Trevillian." It is to be observed, that Mr. Boodle states this merely from recollection of what passed in conversation between him and the deceased; it is no part of the written documents or instructions; probably he understood the deceased rather too strongly; the deceased could not have understood that there was any old promise or any moral obligation existing, as to those books and pictures to give them to Mr. Trevillian, for he had disposed of them in different ways before: he gives them now to his brother for life, then as part of his residue, then to Mr. Benjamin Harrison, with Shawfield, unless the residue is under a certain sum, and if the residue does not exceed that sum, then they are to compose part of the residue. At this time, when he was angry with Mr. Benjamin Harrison, he might feel no great disinclination to separate them from the Shawfield property, and, seeing Mr. Trevillian there, and having received the books and pictures from a relation of his wife, he might say, I ought to give them to Mr. Trevillian: he does not afterwards adhere to that; but this is not extraordinary either if he should afterwards become reconciled to Mr. Benjamin Harrison, or if he should determine on giving the Shawfield property to Mr. Kinleside, again meaning to let the books and pictures go with the house.—Mr. Boodle says, "that the instructions for the codicil were given to the deponent by the de-

ceased himself, by word of mouth, without the interference of any other person, and taken down in writing in the margin of the drafts of the two former codicils. The deponent arranged with the deceased the day on which he would attend him with the codicil for execution, and, as the deceased expressed some anxiety about it, the deponent named the earliest day; and being anxious about the alteration in regard to the pictures and books, the deponent did not consider it at the time so much a codicil to be regularly executed, as a clear expression of what the deceased then intended, and to be effectual, in case any thing should happen before the deponent could return with the codicil he was about to prepare." He states, "that he brought distinctly to the deceased's recollection what he had done in regard to those pictures and books, as well by his will as by his codicil, and having obtained from him a clear and unequivocal expression of his wish, he wrote in the margin of the codicil he was about to alter the disposition which he wished to make of the books and pictures, expressing in it not only the person to whom he did leave them, but the two persons to whom he then said he did not mean to leave them, though he had left them to the one by his will, as part of his residuary personal estate, and to the other by a codicil in express terms." Nothing could be more cautious and proper than the conduct of Mr. Boodle upon this occasion. The servant Taylor is then called in, and this small codicil in the margin of the other is signed by the deceased, and attested by Mr. Boodle and Taylor. He says "that on the 2nd of September, 1812, he went again to the deceased at Widmore, pursuant to appointment, and he took with him the codicil which had been drawn out, and was prepared for execution, which he read over to the deceased, who pointed out an omission in regard to the appointment of the Rev. William Kinleside as one of his executors, for which he had given instruction to deponent on the former day: the deponent had then taken it down in writing in the margin of one of the draft codicils; but which not being before the person who drew the codicil at the time he so prepared it, that part was omitted. The deponent accordingly, by the deceased's desire, introduced the words 'constituting the Rev. William Kinleside executor agreeably to the deceased's request and former instructions:' this being done, and the codicil having been carefully read over and fully explained to the deceased, with reference to his former testamentary dispositions, which were then before them, and the deceased being entirely satisfied with it, and having expressed his approbation of it, the witnesses were then sent for." Taylor and Coleborn came in—the instrument is executed and attested: and Mr. Boodle adds, "that had any thing remarkable occurred before, or in the course of the execution, or afterwards, on that occasion, it would have made an impression on his mind." He then goes on to state very fully his opinion of the deceased's capacity at this time; and he adds, "the deponent was particularly careful to ascertain the state of the deceased's mind and memory; he gave his reasons for every thing he did, and he was, in every respect, in a very fit state of mind to make any alteration whatever in the testamentary disposition of his property: the only particular thing which was apparent in the deceased, was a certain degree of irritation on his mind at Mr. Benjamin Harrison having refused to act as his executor."—The credit and the accuracy of Mr. Boodle has not been in the slightest degree questioned in this case: indeed, the counsel for Mr. Benjamin Harrison have gone so far

as to say, that every syllable which he has stated is perfectly correct and accurate. The Court is disposed so far to agree with them, as to think that his evidence has been given with most perfect integrity of mind, and intended to be most perfectly correct; at the same time, to mere parol conversation, in the course of this transaction, Mr. Boodle may be, like all other human beings, liable to some inaccuracy of recollection.

The two men called in, Taylor and Coleborn, who attest this act, depose to their belief of the deceased's incapacity—that he called Coleborn, Welsh, and asked if he was to sign “Governor;” circumstances which are not of the least weight against those facts spoken to by Mr. Boodle. Taylor, indeed, does not rely solely upon what passed upon this occasion, but he speaks from his general incapacity as well as from what passed upon the occasion; and the argument has been pushed to the length of contending, that Taylor might be right, and that Mr. Boodle might be wrong, for that, from the middle of the year 1812, *the deceased had a latent defect of memory, which rendered him incapable of any testamentary act.* The Court would rather have expected to have heard some precedent or authority for such a position: that because the memory of a person may in some respects be defective, therefore it is not a testamentary memory. We very well know that memory is excessively different in different persons—nothing is more various—its powers are very different in the same person at different times, and more particularly at different periods of life; in old age it is much less retentive, and more liable to confusion. Lord Coke says, a man ought to have a “disposing memory,” so as to have an ability to make a disposition with understanding and reason: so says Swinburne—“if a man in his old age becomes a very child again, and is so forgetful that he has forgotten his own name, he cannot make a will; but the infirmities of old age, which do not take away the use of reason, do not hinder them in that condition from making a will.” Latent insanity we can understand, but latent defect of memory, showing itself only occasionally, when, from bodily attacks or from confusion, arising from long and complicated transactions, a man may become defective in his memory—and rendered absolutely and permanently intestable, is a position for which I know of no authority. Mr. Boodle, it is true, certainly does not upon this occasion go through the whole items of all the will and codicils as a preliminary, in order to ascertain whether or not some latent defect of memory and confusion might not be discoverable, but he brings to the recollection of the deceased every thing connected with the particular disposition he has made, and the memory is so far found to be perfect, that Mr. Boodle is quite satisfied as to the capacity upon that occasion. The Court has something better—the Court has the instrument itself before it, dictated by the directions of the deceased himself, for Mr. Boodle says he received no assistance whatever—it was his own instructions from his own mouth; and in that instrument it is recited, “that whereas Benjamin Harrison, of Guy’s Hospital, Esq. having declared his intention not to act as an executor of my will, I do therefore hereby revoke the appointment of him as one of my executors, not only in the event of my dying in the lifetime of my brother, John Harrison, but also in the event of my surviving my said brother; and I do hereby appoint the Rev. William

Kinleside to be an executor of my will, as well in the former as in the latter event;" and then he goes on to recite, that whereas by his codicil he had given the books and pictures, in case of surviving his brother, unto the said Benjamin Harrison, his executors, administrators, and assigns; he revokes that, and now gives them to Mr. Trevillian, &c.; he recollects then the grounds of the alterations—delusion of mind is in no degree suggested or imputed—it is quite disavowed—the fact itself is proved, and has not been controverted. Mr. Benjamin Harrison did declare he would not act as executor with Mr. Kinleside; he desired this intention to be communicated to the deceased;—the deceased's papers entrusted to his custody are returned to him; he had removed from Widmore, and never after September, 1812, kept up the least intercourse with the deceased; then the facts being so, and the instructions, from the evidence of Mr. Boodle, coming thus voluntarily from the deceased himself, and stating these facts, to maintain that there is any latent want of disposing memory, or any thing that can justify Taylor's opinion of the incapacity at this time, I can hardly think could have been meant to be seriously contended by the advocates of Mr. Benjamin Harrison.—But here is not only memory, but an activity of memory quite extraordinary. Under the will Mr. Kinleside was only an executor in the event of his surviving his brother;—Mr. Harrison was so in both events;—he gave instructions not only to revoke Mr. Harrison in both events, but to appoint Mr. Kinleside in both events. Mr. Boodle's clerk omitted that provision,—the omission escaped Mr. Boodle himself: but the deceased, on the codicil being read over to him, observes it;—it is rectified and interlined in the instrument. Under these circumstances I can have no doubt in pronouncing for these two codicils.

In respect to the other codicils they stand on different evidence, and are contested upon additional grounds:—those two other codicils may in effect be considered as constituting one instrument, that of the 21st of March, 1814, being included in that of the 27th of April following; and as to this latter codicil, holding that the deceased's permanent incapacity is not proved, and the instrument itself, one duplicate of it at least, being in the deceased's own hand-writing, the three attesting witnesses, and a fourth person who was present, speaking to the reading over, the execution, and the capacity at the time, there would be *prima facie* proof it was the free act of a capable testator. But the act may be impeached by proving it was obtained by fraudulent incitement and undue solicitation practised on a weak and unresisting capacity; and therefore this is the point on which the Court is called to examine this part of the case; and it necessarily opens to some other parts of the evidence, namely, that which sets forth the previous intentions of the deceased, the grounds of change of disposition as to Mr. Malin and Mr. Harrison, and the manner in which this codicil was executed. The deceased's regard for Mr. Benjamin Harrison is mentioned in the will itself, and the other testamentary instruments fully establish it;—though of the same name, Mr. Benjamin Harrison appears not to have been related to the deceased. His connexion appears to have grown principally out of some transactions and services which he had rendered to the brother John Harrison; but he at length became an object of the increasing kindness and testamentary bounty of both brothers. He came to reside at Widmore for the purpose of being near them;—and in the year 1808 he was the devisee of Shawfield Lodge, under the contin-

gencies already stated. Under a former instrument it appears from the evidence of Mr. Boodle, that the Shawfield Lodge estate would have gone to Mr. Kinleside as the residuary legatee; but this regard to Mr. Benjamin Harrison operates both ways; if there was no breach of this regard, it would operate strongly against the change of disposition; but on the other hand, if there was not only a quarrel, but a total discontinuance of all intercourse, the former regard and intended kindness would tend to render the subsequent sense of unkindness and ingratitude deeper, and constantly rankling in the mind of the deceased;—that a breach did take place between them, that Mr. Benjamin Harrison declared he would not act as executor with Mr. Kinleside; that in consequence of such declaration the deceased made the codicil I have already pronounced for, is fully established; and in making that codicil there is not the slightest appearance of fraud, circumvention, or undue incitement, because it is not suggested even in the plea, to have taken place till after the death of the brother. The cause of the breach originates in the difficulties of Mr. Malin, who had already received 13,000*l.* of these brothers, and who owed the deceased about 5000*l.*, besides some other sums, on account of business and interest, because I observe in Mr. Malin's account of Benjamin and John Harrison, there was a considerable balance in the month of December, 1812, and that does not appear upon the evidence to have been paid over to the deceased. Now these difficulties, which took place sometime about the summer of 1812, appear to have occasioned to the deceased great anxiety of mind;—that is a part of the case of the opposer of the codicil. He does not consult Mr. Benjamin Harrison upon them, or if he did, he was not satisfied with the advice that he received; for he consults his friend Mr. Wells upon the occasion, and Mr. Wells states, “that the deceased was accustomed to apply to him for friendly advice, in any circumstances of difficulty; and that in June, 1812, the deceased applied to the deponent on the subject of the affairs of Mr. Paul Malin, a young man to whom the deceased had advanced large sums of money, and who had then stopped payment. The deceased was in great distress of mind; and the deponent upon that occasion recommended him to send for his relation, the Rev. William Kinleside, a clergyman residing in Sussex, of whom the deponent had always heard the deceased speak in terms of the greatest affection, and who being, as the deponent believed, the adopted heir of the deceased and of his brother, was, in the opinion of the deponent, the most proper person to be consulted by the deceased, under the circumstances in which he was placed. The deceased acceding to that opinion, the deponent, by his desire, wrote to Mr. Kinleside, who came accordingly. The deponent acquainted Mr. Benjamin Harrison with his having so written to Mr. Kinleside; from that time the deponent had no communication with the deceased upon the subject of his affairs, till after the death of his brother.” He states on his second examination on the fourteenth article, “that the deponent never did attempt to influence the deceased against the said Benjamin Harrison, or in favour of the said Mr. Kinleside, or ever say one word to the deceased to induce him to make any alteration whatever in his testamentary dispositions in respect to the Widmore estate, or any other part of his property. There are two occasions in which he remembers to have spoken to the deceased of Mr. Kinleside in favourable terms;—one was after Mr. Benjamin Harrison had declared his determination not to act

as the deceased's executor with Mr. Kinleside, on which occasion the deceased applied to the deponent to be an executor in his stead; and, in resisting the persevering application of the deceased to that effect, the deponent told the deceased that he could not have better executors than Mr. Stanley and Mr. Kinleside, and he believes he did then speak of Mr. Kinleside as a man of honour and a gentleman;—the other occasion was soon after the failure of Mr. Malin, as it was in consequence of Mr. Kinleside's having come up at the request of the deceased to investigate his accounts. The deponent, in giving his opinion to the deceased of the conduct of Mr. Benjamin Harrison at a meeting which he had had with Mr. Kinleside, in the presence of the deceased and the deponent, when much irritating language was used, spoke of the conduct of Mr. Kinleside as having been perfectly that of a gentleman; and he spoke also in terms of disapprobation of the language used by Mr. Benjamin Harrison; but he did not then or at any time say any thing to the deceased to the prejudice of the character of Mr. Benjamin Harrison to influence the deceased to do any testamentary act whatever that would be either unfavourable to Mr. Benjamin Harrison, or favourable to Mr. Kinleside."

Now, the conduct and credit of this witness have been very freely canvassed in the course of the discussion. He is charged in plea with having together with Mrs. Jukes and Mr. Kinleside, urged and excited the deceased;—of that charge at the period of time which the Court is now examining, namely, in 1812, and the beginning of 1813, there is not a suggestion; for even Taylor does not suggest it till after December, 1813. The plea itself, as I have stated, does not charge it till after the death of Mr. John Harrison. What then is the character of Mr. Wells, and his conduct upon this occasion? He is a gentleman of fortune, residing close to the deceased;—he has not the slightest pecuniary interest in any of these transactions, or in the event of this suit. The deceased had resided for many years as an inmate in the house of his uncle and of his father;—there must have been a sort of filial regard, a sort of hereditary friendship between this gentleman and the deceased, something of more than an ordinary sort;—it was not discontinued;—the strictness of intimacy between them is kept up to the end of his life. The deceased having a key of the shrubbery, often calls on Mr. Wells;—Mr. Wells calls on the deceased, and they often dined together. Mr. Wells is not a boy;—he is described as fifty-six years of age. Now what is so natural as that the deceased, when in difficulty, should resort to Mr. Wells for his friendly advice, and that Mr. Wells should give it him with sincerity, and with a degree of filial respect and attachment. What is the advice he does give him upon this occasion? He does not obtrude into the deceased's concerns;—he rather avoids it, and declines it;—he desires him to send for Mr. Kinleside. Now it does not appear that there existed at this time any particular intimacy between Mr. Wells and Mr. Kinleside. Mr. Kinleside was the most proper person to be sent for;—he was not only a relation for whom the deceased had expressed at all times the greatest regard, but he was the residuary legatee;—and therefore, whatever losses might arise to the deceased from Mr. Malin's difficulties, would ultimately fall on Mr. Kinleside, as the residuary legatee. Much indeed is said of fraudulent excitement and solicitation, but I have looked through this voluminous evidence in vain for the proof of it. Here is no clandes-

tinuity in any part of this transaction. Mr. Wells informs Mr. Benjamin Harrison, that by the desire of the deceased he had written to Mr. Kinleside;—that is followed by an interview between all the parties:—Mr. Kinleside was apprehensive of loss, and might make offensive or unfounded charges against Mr. Benjamin Harrison;—but it is done openly, he is present, and he has an opportunity of defending and justifying himself in the presence of the deceased and Mr. Wells;—Mr. Wells was a disinterested by-stander;—he was a friend of the deceased, and meant to give him an honest opinion: which was right and which was wrong the Court has no sufficient means of judging. Mr. Benjamin Harrison might be very injuriously charged;—he might be very justly indignant against Mr. Kinleside;—he might think the opinion of Mr. Wells perfectly erroneous:—all the Court knows is, that Mr. Benjamin Harrison was a good deal irritated on the occasion, and seems to have used pretty strong language;—but he not only used pretty strong language, but took pretty strong measures;—he determines he will not act with Mr. Kinleside;—he desires his determination to be communicated to the deceased; he delivers up the deceased's papers, which he afterwards confesses to Fuzzey he was very foolish in doing. All this induced the deceased to revoke his appointment of executor, and to appoint Mr. Kinleside in his place; and it induced him also to revoke the bequest of the books and pictures, and to give them to Mr. Trevillian. When people are angry, whether with or without cause, they will allow their passions to suggest fraud or dishonourable conduct against others;—but such charges must be supported by proof of the fact; the Court cannot without evidence presume that fraud was committed. I see no appearance of fraud at this time in Mr. Wells's conduct, as far as I have hitherto examined it. I see nothing but what was perfectly honourable and disinterested, and what his friendship and regard for the deceased imposed on him as a duty. In the month of September, while the deceased is revoking the appointment of Mr. Benjamin Harrison from the office of executor, he declares what are his views in respect to Mr. Malin, and this does not rest upon any loose recollection of what passed in conversation between the deceased and Mr. Boodle, but it was at that time reduced into writing in the margin of the exhibit No. 3., where there is an entry made in Mr. Boodle's hand-writing:—31st August, 1812, Mr. Harrison having lent to Mr. Malin 4500*l.* on bond, and 500*l.* on note, means to give him up both bond and note, and then to revoke this legacy of 5000*l.*” And here is a memorandum at the end of the draft of the codicil to this effect, from Mr. Boodle to the deceased, “I have not revoked the legacy of 5000*l.* to Mr. Malin, and Mr. Andrews Harrison should not deliver up his bond and note, unless he means him to run the chance of having 10,000*l.* instead of 5000*l.*, as Mr. John Harrison, if he survives his brother, bequeaths to Mr. Malin 5000*l.*” Then here it is quite clear, that it was not the intention of the deceased to give Mr. Malin both the legacy of 5000*l.* under his codicil, and the benefit of his bond and note, but that one was to be set off against the other.

It is however contended, in respect to Mr. Benjamin Harrison, that if the deceased had intended to revoke the benefits to him under the will, he would have done it when he executed this codicil revoking the executorship, and that his doing it afterwards can only be accounted for by some fraudulent excitement practised upon him, and the taking advantage of his vacant faculties, and his loss of memory; but to this infe-

rence the Court cannot proceed upon the evidence before it, and looking at the probability arising out of the facts, it was natural enough that the deceased, a person of calm and moral mind, should at first act with considerable forbearance towards a person for whom he had for a long time entertained great regard and confidence, it was necessary to provide for the executorship more immediately; but he might naturally think he would give Mr. Benjamin Harrison more time to reflect, and consequently make advances towards a reconciliation, more especially as his brother was then living, and might survive him.—It is not quite correctly stated that he only felt regret at Mr. Benjamin Harrison having refused to act as executor with Mr. Kinleside; for Mr. Boodle's words are, that "he observed a certain degree of irritation in his mind at Mr. Benjamin Harrison having refused to act as his executor;" and without presuming fraud, I think there are sufficient circumstances to account for that irritation afterwards increasing. In the month of January following, Mr. Malin becomes bankrupt. I understand the loss, therefore, which might be only apprehended in September, was then realized, whether to the exact amount of 5000*l.*, or more, or less, does not appear; whether he received any dividend on the bond and note,—whether there was a balance of account of Andrews and John Harrison,—whether the interest was paid, I do not ascertain, nor is it, perhaps, very material;—but here is this fact, that a loss did occur by the bankruptcy. Mr. Walmsley states, that "he cannot depose particularly as to the time, but believes it was subsequent to 1812; whether it was in the latter end of that year, or in the course of the following year, he does not remember. He having gone down to Widmore to visit the deceased, found him in a state of considerable irritation against Mr. Benjamin Harrison, of whose conduct he spoke in terms of great displeasure, but to the particular expressions which the deceased used, or to the cause of his irritation and displeasure, he cannot depose, further than that the deceased alluded to the conduct of Mr. Benjamin Harrison in not having apprized him of the proceedings of Mr. Malin, and protected him from the loss which the deceased had sustained by Mr. Harrison's connivance or neglect." Now, as the deceased was at this time in a state of considerable irritation, the supposed cause of it is the loss that had been sustained; probably it took place about the beginning of the year 1813. The deponent adds, "he did occasionally hear the deceased speak of Benjamin Harrison afterwards, but never in kind terms."

Now, whether the deceased originally formed a right or a wrong judgment in imputing to Mr. Benjamin Harrison neglect or connivance, is not a question for the Court to determine;—such was his impression. Here is no loss of memory in regard to it; and an increase of irritation is not extraordinary or improbable.

Mr. Boodle states, "that shortly before the death of Mr. John Harrison," which was in the latter end of 1813, "the deceased expressed to the respondent, who was then at Widmore on other business, a wish to alter his will; but it was thought by Mr. Wells, a neighbour and friend of the deceased's, Mr. Kinleside, and the respondent, that, considering the circumstances under which this will had been made, and the state in which his brother then was, which was that of total incapacity, it would not be a proper proceeding; and it was then abandoned." The wish and intention therefore to alter this will is here observed to be going on;—it shows itself shortly before the death of the brother. Mr.

Boodle, it seems, had an opinion that no alteration ought to take place; and at that time, to a certain degree, he might be right. Mr. John Harrison was not in a condition to make a corresponding alteration, and if he should survive the deceased, not only his residue, but the residue of Andrews Harrison's property, would pass under the will of John Harrison;—Andrews Harrison, therefore, could not alter his will without in some degree defeating his brother's disposition of the residue, and he had no power over his brother's residue unless in the case of surviving him: it seemed therefore by no means improper or unnatural, as John Harrison was approaching his dissolution, that these gentlemen should advise, and the deceased acquiesce in abandoning the matter, or at least in postponing it; but the decease of his brother no sooner takes place, than we find Mr. Andrews Harrison again expressing his wish to proceed to the alteration of his will, and taking measures for that purpose.

Mr. Wells states, upon his first examination, "that soon after the event of the brother's death, the deceased, in conversation with him, expressed his dissatisfaction and regret at the disposition he had made of some parts of his property, but more particularly in regard to Shawfield Lodge and estate, which had been his brother's residence; the deceased was evidently uneasy at the contents of his will as it then stood; he expressed his wish to have it altered, and repeated his distress of mind on different days. In the beginning of the month of December, 1813, as he now best recollects, the deponent, by the desire of the deceased, met Mr. Boodle, the deceased's solicitor, at the house of Mrs. Jukes. Upon that occasion Mr. Boodle's conduct is detailed; and then the meetings took place upon the 7th and the 14th of December, which I have already examined. The deceased upon those occasions endeavoured to do too much;—he had undergone much agitation and distress of mind, during the illness and after the death of his brother; he was worse at that time, the thing is attempted without success, and remains undone; but, as to the deceased's wish and desire to revoke the benefits to Mr. Benjamin Harrison and Mr. Paul Malin, nothing could be more clear than upon both the occasions of those meetings in December; all the witnesses, and all the memorandums then made, manifestly declare that to have been his wish. Indeed, the objection is of another sort;—not the want of volition, but too great volition, too much irritation on the occasion: how produced? By fraud. Where is the proof of this fraud? Even Taylor does not speak of any thing till after these two first two meetings had taken place. Mr. Kinleside, on the 10th of December, when he calls on Mr. Boodle, rather seems averse to any alteration taking place;—and it is not clear by the evidence, I rather think it is otherwise, that he was present at the meeting on the 14th of December. No person present at either of the meetings attempts to excite the deceased on the occasion. Whatever irritation therefore existed in the mind of the deceased, existed without any proof of circumvention; and it is not very extraordinary at that period of time:—for, what were the circumstances? John Harrison had lately died, to whom the deceased was most affectionately attached. He, as well as the deceased himself, was the intended benefactor of Mr. Benjamin Harrison. Mr. Benjamin Harrison was the executor of Mr. John Harrison;—he does not act as his executor;—he does not call on the deceased;—he does not as far as appears, write a letter of condolence to the deceased on the oc-

casion, or take the least notice of the event of the death of Mr. John Harrison. The apology offered by counsel is, that he might not choose to expose himself to the insults of Mr. Kinleside or Mrs. Jukes. In the first place, with respect to Mr. Kinleside, he was much more absent at that time than present; and as to the danger of Mr. Harrison being insulted by this old lady of eighty years of age, it was not a very formidable danger, nor justly apprehended; for when Mr. Andrews Harrison calls, Mrs. Jukes, with great kindness, says, "I am sure, Sir, you will be glad to hear that Mr. and Mrs. Benjamin Harrison and all the children are well, at Guys." The deceased naturally enough considering what was passing in his mind, and if he did retain his memory and capacity, merely muttered,—“I am glad to hear it;” or something to that effect, in a tone and manner not distinctly to be heard.

In March following the deceased himself appears to be active again, and writes to Mr. Boodle to come and make a codicil for him; it does not appear that Mr. Kinleside was even at that time at Widmore. Mr. Boodle writes a letter as to an intelligent agent, proposing to be with him on the 21st of March;—by accident he is prevented attending on that day, but the deceased appears to have expected him, and seems to have prepared himself for what should have taken place; for it is on the 21st of March a codicil is written, and it is very fairly written, in his own hand-writing:—“*It is my wish that Shawfield Lodge estate and premises should go to my residuary legatee, the Rev. William Kinleside, and that I revoke my legacy left to Paul Malin, Andrews Harrison. Widmore, 21st March, 1814.*” On that day Mr. Boodle however was under the necessity of putting off his visit to the 22d, when he and Mr. Stanley did attend, and perhaps the very disappointment might have had some effect on the deceased’s mind;—but on the 23d of March, nothing can be more decided than the deceased’s desire to exclude Mr. Harrison and Mr. Malin, and to give Shawfield to Mr. Kinleside;—it being the first part, and the middle part, and the last part of that paper and memorandum which Mr. Boodle drew up upon the occasion. The deceased was too confused, in Mr. Boodle’s opinion, to induce him to make a codicil;—but, as to all this being a fraud on the deceased, the very circumstance of sending for Mr. Boodle on these three occasions, the 7th of December, 1813; the 14th of December, 1813; and the 22d of March, 1814, goes very strongly to repel the insinuation.

Thus far, considering these circumstances, that Mr. Benjamin Harrison had wholly withdrawn himself from the deceased, and never called on him, it does not require the gratuitous assumption of fraudulent excitement in order to account for this increased irritation against him; but it requires some proof of the solicitation and importunity charged, and this brings me necessarily to consider that part of the evidence, for it is only about this period, namely, in the beginning, and in the spring of 1814, that there is the slightest attempt to support the charge by any thing like evidence.

I may, perhaps, preliminarily observe, that importunity, in its correct legal acceptation, must be in such a degree as to take away from the testator free agency;—it must be such importunity as he is too weak to resist;—such as will render the act no longer the act of the deceased;—not the free act of a capable testator, in order to invalidate an instrument.

Now, the charges themselves pretty well, I think, answer each other:

—for, if the deceased was thus anxious even to irritation, to deprive Mr. Benjamin Harrison of these testamentary benefits, where could be the necessity for all this urging and importunity? The two grounds are hardly consistent with each other. As against Mr. Wells, it is Taylor alone who suggests it;—he pretends indeed that the deceased being very deaf he could not avoid hearing what passed as he went to and fro along the passage. I think, on the 8th interrogatory, he states, that early in 1814, before the month of March, the respondent heard Mr. Wells, and he mentions Mr. Kinleside also, continually persuading the deceased to take away the Widmore estate from Mr. Benjamin Harrison, and leave it to Mr. Kinleside.

Though the deceased was very deaf, though the house is described as very small, he is the single witness who overhears any thing of this kind. The other witnesses, the maid-servants, hear nothing of this sort, so far as respects Mr. Wells;—and Mr. Wells has most decidedly and positively denied the charge upon his oath. Now, upon the evidence of Taylor, I do not think the fact of urging the deceased, as charged against Mr. Wells, in any degree proved, and therefore it is unnecessary to consider what would be its legal effect. Alexander is a witness entitled to more attention; she does overhear Mr. Kinleside and Mrs. Jukes say that to which she deposes, but nothing concerning Mr. Wells; at the same time, without deducting from her veracity, yet considering how likely any conversations are to be misapprehended, considering how much more likely pieces and patches of conversations are to be misapprehended, the witness not being present, and hearing the preceding and following parts, the Court must attend to evidence of this sort with considerable caution; more especially when it is to conversation with a person who is liable occasionally to interruption and confusion of faculties, and Alexander had been talked to and urged a good deal by Taylor, who had related to her many things she did not recollect, and who said her memory was very bad, and therefore without meaning to say any thing beyond the truth, she might have confounded what she heard from Taylor with what she heard herself, wishing not wilfully to forget any thing.

But taking it at the utmost stretch, what does it amount to? Her account is this, “She never heard Mr. Wells say any thing to the deceased upon the subject;—she knows that he was there very often;—he used very frequently to call on the deceased, though not more at one time than another; but she never heard him say any thing about his will, or the Widmore estate to the deceased:—she has heard both Mrs. Jukes and Mr. Kinleside conversing with the deceased about his will, and about the said estate; she remembers, that for some time before the last codicil was made, which was in the month of April, 1814, she heard Mrs. Jukes tell the deceased that he ought to alter his will;—the only persons the deponent heard mentioned by her were Mr. Malin and Mr. Benjamin Harrison, and she told the deceased that he ought to alter his will, because if it was not altered Mr. Malin would have that money again, which he ought not, for he had acted very improperly, or something to that purpose. The deponent never heard her say who ought to have any thing; and she does not know that she ever heard Mrs. Jukes say any thing to the deceased about Shawfield or the Widmore estate, she cannot recollect it if she did; the principal thing she said was about Mr. Malin, who she said would have the money if the will was not altered,

and that he ought not to have it."—Here then is no fraud and no falsehood in all this;—it is correctly true; it is no more than what the deceased himself had expressed to Mr. Boodle, in September, 1812; the deceased himself then thought that Mr. Malin ought not to have the 5000*l.* he owed him and also the legacy of 5000*l.*;—even supposing therefore that nothing had preceded what this witness overheard, that the deceased had been talking with Mrs. Jukes, and that she merely repeated his opinion, was this any thing like fraudulent excitement to remind him that such a thing should be done? Looking at these facts, it does not appear to me to amount to that which can affect the instruments.

The witness then goes on;—as to Mr. Kinleside she says, "She has often heard the deceased and Mr. Kinleside in conversation together upon the subject of the Widmore estate; they used to go together into the deceased's room, up stairs, where they were for a long time together frequently;—the deponent does not think she ever heard any thing that passed when they were there; but she remembers hearing them talking when they came out of the room upon the landing-place, and in the passage she recollects the deceased's saying to Mr. Kinleside, the house is your's;—No Sir, said Mr. Kinleside, the house is not mine; the house is Mr. Benjamin Harrison's. The deceased said he meant the house to be his; that Mr. Benjamin Harrison had offended him. Mr. Kinleside said, the house could not be his, as it was not left to him. The deponent cannot remember the exact words, but it was to that effect; for the deceased and Mr. Kinleside being both deaf, they were both of them obliged to speak loud, and the deponent sitting in her own room heard very distinctly what was said."—Again, taking all this at the very worst, after these two persons had been, as the witness says, for a long time together in the deceased's room, looking over this long will, when they come out, they are talking together on the landing-place loud enough to be heard all over this small house. What is the whole that happens? The deceased appears to have got into some confusion, as he did after the transaction with Mr. Boodle;—he says the house is your's; Mr. Kinleside explains it, and says, the house is not mine, the house is Mr. Benjamin Harrison's;—the testator says, Mr. Benjamin Harrison has offended him, and he means to give it to Mr. Kinleside. It is as little like urging on one side, and unwillingness on the other, as can be stated. She goes on further, "She several times heard the deceased say that Mr. Benjamin Harrison had offended him, and she also heard the said Mr. Kinleside say several times to the deceased that the house was Mr. Benjamin Harrison's; it cannot be mine; it is Mr. Benjamin Harrison's; you have left it to him. And the deceased said he did not mean Mr. Benjamin Harrison to have it; he meant him, Mr. Kinleside to have it." This is all open to the same observation.

. Now, as to the suggesting of the codicil, she says, "she does remember hearing Mr. Kinleside tell the deceased that he could not go through his will, and that he had better make a codicil. She well remembers that when they were talking about the estate, by which she supposed them to mean the Widmore estate, Mr. Kinleside did tell the deceased that he could not have it unless it was left to him. The deceased said he did mean him to have it. Mr. Kinleside then said, that there was no occasion for a fresh will; that only a codicil was wanting; that a will was too much for him to go through; and that a codicil would do as well, or to that effect. She says, that she

never heard Mr. Kinleside press the deceased not to employ Mr. Boodle, or observe that he was too particular, or say any thing to the deceased about Mr. Boodle. She well remembers that the deceased was very angry with Mr. Benjamin Harrison; he was very much disturbed at his sending home some papers, as she believes, and refusing to act for him; he cried so much about it that the deponent was distressed to see him; that she frequently heard him talking about taking away the estate from Mr. Benjamin Harrison; he was quite bent upon it."— Taking the whole of this account, and considering it judicially and impartially, it seems to tend rather more to the support than to the defeat of these codicils: the Court is not called upon to decide upon nice points of delicacy in the conduct of parties, but to consider their legal effect, not whether Mr. Kinleside ought to have practised more forbearance and self-denial, and that he ought not to have put the deceased into the way of carrying his wishes into effect, because those wishes tended to his benefit; but what I am to consider is, whether he was guilty of such fraudulent importunity on the deceased as can defeat the effect of a codicil which is in other respects proved, and render it not the act of the deceased. The deceased upon this evidence, instead of being urged to take away the property from Mr. Benjamin Harrison, and give it to Mr. Kinleside, Mrs. Alexander says, "he was quite bent upon it," and the utmost is, that Mr. Kinleside sets him right when he says he is to have the house, and explains to him that the best mode of carrying his intention into effect, is not by making a new will, but by confining himself to a codicil, he having on former occasions been found to have failed in making these new dispositions which were proposed. I think that is the utmost extent to which I can carry this evidence.

Mr. Wells, to whom as much credit appears to be due as to any witness in the cause, the Court making allowances for the slight inaccuracies which belong to all human testimony, however fairly it is given, carries on this transaction, and says, "that after the 22d of March the deceased appeared to be disquieted and unhappy; and he particularly recollects, that one morning within a few days after he was walking with the deceased in the grounds of Shawfield Lodge, the deceased expressed his unhappiness, that according to the then state of his will, that property would go to Mr. Benjamin Harrison, which he particularly wished to leave to Mr. Kinleside. That shortly afterwards the deceased showed to the deponent a paper-writing, drawn up and prepared for execution, as a codicil to his will, and which he stated to have been drawn up at his request by a legal friend of Mr. Kinleside's, who, as the deponent has since understood, is a Mr. Holmes of Arundel. It is not wholly immaterial as referrible to another part of the evidence, that the deceased at that time did not mention by whom this paper was prepared, all he said was, that it was by a legal friend of Mr. Kinleside's; but whether that legal friend might reside in London, or in Sussex, the deceased does not appear at that time to have mentioned; he might have supposed it was in London. He says "that the deceased expressed a wish to execute the codicil, and desired the deponent to call upon a Mr. Latter, a solicitor residing at Bromley, upon the subject. The deponent accordingly did so, and consulted with him upon it. The deponent never had the paper in his possession and knew not of its existence till it was shown to him by the deceased. The deponent mentioned to Mr. Latter, at the time he delivered the deceased's request for him to

attend, what the deceased had communicated to him respecting the preparing of such codicil, and asked Mr. Latter whether it was an irregular mode of proceeding. Mr. Latter said it was more regular for the person who had prepared an instrument to be present, but not absolutely necessary; and he then recommended that it should be copied by the deceased; and that the witnesses, besides himself, should be Dr. Smith, the clergyman of the parish, and the apothecary who was in the habit of attending the deceased. The deponent mentioned to Mr. Latter likewise the circumstances attending the visits of Mr. Boodle to the deceased. He then communicated to the deceased what had so passed between himself and Mr. Latter, and the suggestion of Mr. Latter, that the paper should be copied by him, to which the deceased acceded." He goes on, and states, "that a few days afterwards he, at the earnest desire of the deceased, went to the house of Mrs. Jukes," where the execution took place.

Now certainly in this account there does occur a circumstance in the preparation of this instrument, that always excites the jealousy and vigilance of the Court,—and it has been much pressed in argument;—the codicil is prepared through the agency of the party benefitted, and without the professional person who prepares it having had access to the deceased for the purpose of taking his instructions: but the Court must take care not to convert a circumstance which is only a reason for vigilance and caution, into an actual defeazance of the right of testamentary disposition, and of the clear testamentary dispositions of a capable testator. The degree of alarm excited by such a circumstance depends upon the other circumstances which accompany it: the thing frequently happens, and without exciting much, though upon all occasions, a certain portion of caution.

It was observed in respect to this part of the transaction, that Mr. Boodle was not employed. Now, after the three unsuccessful attempts which had taken place, and the course which Mr. Boodle thought it necessary to pursue upon those occasions, it is by no means unnatural or improbable that the deceased himself might wish that another mode might be tried, or at least that he might readily acquiesce in it, and adopt it, when it was proposed to him. Mr. Wells states, in his second examination, "that according to the best of his recollection, the deceased did express his displeasure at Mr. Boodle's having refused to prepare the codicil, as well as his grief that it had not been done;" and here is the deceased's own declaration to Mr. Wells, that it had been drawn up at his request by a legal friend of Mr. Kinleside. If Mr. Kinleside had brought this codicil to the deceased so prepared, and had got it executed in his own presence, calling in some servants, or other ignorant persons to attest the mere formal execution of the instrument, it would have been very alarming indeed. Such a mode of proceeding would have savoured pretty strongly of fraudulent circumvention; but the course taken is extremely different. It is charged indeed in the plea, "that Mr. Kinleside having taken up his residence at Shawfield, endeavoured to persuade the deceased," and so on. The fact is, he does not take up his residence there till after the execution of this codicil, namely, in the month of May, and then not at his own suggestion, but at the request and solicitation of the deceased and Mr. Walmsley, who thought it would be for the comfort of the deceased; but Mr. Kinleside leaves the codicil in the hands of the testator;—he returns to Sussex;—and the deceased is left to execute it or not as he thinks proper. The

deceased, being thus left to himself, with the codicil in his possession, naturally enough consults his friend Mr. Wells on the mode of proceeding;—states that he wishes to proceed to the execution of it; and the mode is adopted which is set forth in the deposition of Mr. Wells.—The deceased's manner of going through the several steps towards the execution is strongly indicative of mind, memory, and understanding: he conducts those steps himself;—and as to tutoring an old man who had lost his understanding and memory, to go through the whole of this in the way I am about to state, it is not only unsupported by any proof, but it appears to me quite an extravagant supposition.

The deceased was recommended by Mr. Latter to make a copy of the codicil; and he does accordingly make a copy, which is the best possible evidence that he understood and approved the contents of that instrument, supposing he had any degree of capacity at this time. Here Taylor again is called in, and he suggests that the copy was made by the intervention of Mrs. Jukes's assistance: he states, “that he very well remembers that he saw the deceased on two or three different days in April, 1814, copying from a paper before him:—what it was he did not see; he knows that the deceased had great difficulty in copying it, for the respondent was called upon by Mrs. Jukes to administer valerian to him, while about it: and in going in and out of the room, he saw Mrs. Jukes assisting the deceased, taking care that he had not too much ink in his pen, and pointing to the lines from which he was copying. The respondent thinks that the deceased could not by any means have written the paper without assistance.” Such is the opinion of Taylor: his opinion is, that the deceased was utterly incapable, from the middle of the year 1812, so that as to these facts, the Court cannot very safely rely on his testimony: but supposing he were correct in this statement, what does it amount to but this, that this old lady looked to see that he had not too much ink in his pen, and that she pointed out the lines from which he was copying? Now the story itself, I think, of the necessity of this assistance, is not very probable, when we recollect that the deceased was able to write these different letters of the 3d of March, 1814, and in January, 1815; and keeps his books of account, and endorses his bills during the whole year: it is not likely that Taylor has formed a just opinion; but if he did receive assistance to this extent, it would not go to invalidate the knowledge of the deceased of the contents of the instrument, or his capacity to judge of the nature of the contents. But here again Mrs. Jukes solemnly deposes, she knew nothing about the copying of this codicil; and bad as her memory is, she thinks it impossible but she must have recollected so striking a circumstance if it ever happened.

The fact, however, is, that one copy of the codicil is in the deceased's own hand-writing: the deceased himself applies to two of the witnesses. Mr. Latter is desired to attend by Mr. Wells: and who are the witnesses called in? Not ignorant persons—not persons to witness a mere formal execution—not persons likely to be parties in a fraud, or to have a fraud imposed on them, but persons as competent to detect a fraud as could be selected—all long acquainted with the deceased—the minister of the parish, the medical attendant of the deceased, and a neighbouring solicitor, who is ordered to attend to judge of the proper form to be gone through; and they are put upon their guard to satisfy themselves of his volition and competency to do the act, and are satisfied on the occasion.

It only therefore remains, that I should state the evidence to these

points. Mr. Ilott says, "that a few days, perhaps three or four, before the 27th of April, the deceased called upon him, and said that in a few days he should want his assistance to see him sign a paper." He states the object of it; nothing further passed then. "On the following Monday, the 25th of April, the deceased's servant came to the deponent, requesting, in his master's name, that the deponent would meet Dr. Smith and Mr. Latter, at the deceased's house, at twelve o'clock on the following Wednesday." So that it is the deceased himself that engages Mr. Ilott for the purpose of attending, three or four days before the execution takes place. He then goes on to state the circumstances of the execution. "At the appointed time he went to the deceased's house, and found there Dr. Smith, Mr. Latter, and Mr. Wells. When he entered, the deceased shook hands with him, and said he was very glad to see him. Mr. Latter asked the deceased to state for what purpose they were assembled, to which the deceased replied, that he wished to make some alterations in his will, for they had robbed him of thousands. Mr. Latter asked him whom he meant, and he said, Paul Malin and Benjamin Harrison. There were two papers lying on the table, one of which the deceased took into his hand; the deceased then gave one of the papers to Mr. Latter, who was requested to read it aloud, which he did slowly and distinctly; that he stopped occasionally, when the deceased expressed his approbation; and when read through, the deceased expressed his approbation of the whole; he then executed it, and the witnesses signed their names. When the business was finished, the deceased thanked them, and said, Now I am happy; and he appeared well pleased and satisfied.

Dr. Smith says, that on Monday, the 25th of April, 1814, the deponent called with the church-wardens of Bromley, and when they had settled their business, the churchwardens took their leave, and the deponent was about to do the same, when the deceased stopped him and said, "I shall be glad to see you here some day this week that is convenient to you." Here again is spontaneous acting from the deceased showing understanding and foresight—not the least appearance of any loss or defect of memory: indeed this circumstance is in some degree confirmed by the entry in his book of accounts, for here are two guineas entered this day, as paid to Dr. Smith for Easter Offerings. He goes on to state, "the deceased said to him, I have been very ill used, Dr. Smith, and I want to make an alteration in my will, for I intend to take the administration of my affairs out of the hands of my executors, and give it to others; the deceased then also mentioned the names of his executors, Mr. Paul Malin and Mr. Benjamin Harrison, saying, they shall have nothing to do with my affairs, and indeed this will was not my will, for it was done by the persuasion of my brother, but now he is gone, I intend to make my own will: no day was fixed for the deponent to come, but the deceased said, I will let you know in time, and they then parted." Here he tells the witness the purpose for which he wants him—that it was to alter the will: he mentions the nature of the alteration, and whom he meant to remove; it was to remove Mr. Paul Malin and Mr. Benjamin Harrison; and it might be true, in some degree, that it was to gratify his brother that he was induced to make the former disposition: but, however, we must not rely too much either as to the sincerity of the statement, or the accuracy of recollection of the person relating the conversation. Dr. Smith goes on to state, "that on the following Wednesday, by appointment, he went and found the

deceased and Mrs. Jukes in the parlour together alone: they talked upon indifferent subjects for a short time, when Mr. Latter, Mr. Ilott, and Mr. Wells, having arrived, Mrs. Jukes left the room, and the deponent then said to the deceased, Pray, Sir, what might you be wanting with us? he replied, I want to make an alteration in my will; he added, that he had lost thousands, and he intended that his executors should have nothing to do with the administration of his will; whether he mentioned their names or not, the deponent does not remember with certainty: the deponent asked who he intended to make his executor. The deceased taking some papers out of a drawer, said, I mean to appoint this, pointing to the name of Kinleside;" perfectly, therefore, recollecting the appointment he had made with this gentleman—the object of it, and the alterations he was now proposing to make, and his reason for so doing. The witness then speaks of the reading over, and asking the deceased's approbation of the codicil, he says, "he proposed that the codicil should be read over to the deceased, and one copy was handed to Mr. Latter, and another to the deceased for that purpose: when Mr. Latter had got a little way in reading it, the deponent stopped him, by asking the deceased if he heard it; the deceased said, yes, Sir, I hear very well. Mr. Latter then proceeded, stopping occasionally to ask the deceased his approbation, who said each time, that is right, and gave his consent to every part. The deponent remembers that the deceased had in his own copy made a reiteration of two or three short words, which being pointed out to him, he himself took a pen and crossed them out;" and they are very short words, merely from mistaking the catch-word, he has inserted "*me, in or by,*" twice over; indeed, the date is inserted in his hand-writing, and as none of the witnesses mention that to have passed during the time they were present, it is another mark of the deceased's memory and recollection that he filled it up before their arrival, in order to prepare the instrument for execution.

Dr. Smith then states the execution and the attestation; and he adds, "that the deceased said, when he had done, Now I am easy and satisfied."

Mr. Latter gives the same account; he confirms Mr. Wells's application to him—his recommending the deceased to make a copy of the codicil, and also his making an appointment for the execution—his afterwards attending the deceased—shaking hands with him, and a little common conversation when Mrs. Jukes left the room; and that the deceased then began by saying, "the reason for my sending for you, gentlemen, is to witness an alteration I wish to make in my will." Some papers were then lying on the table—he said, "I have written this from a copy which a lawyer in London wrote for me to sign." I have already noticed, that if the witness is accurate as to this expression of the deceased, the deceased might not know it was drawn at Arundel, for it is subsequent to this time that Mr. Wells is apprised of that fact. "Dr. Smith then asked him, what was the main point of the intended alteration? the deceased, holding one of the papers, being one part of the intended codicil, in his hand, said, pointing to some lines in it, I wish to exclude these persons from my will: the deponent asked what persons; he said, Paul Malin and Benjamin Harrison: Dr. Smith asked, in that case, who do you wish to be your heir? he answered the Rev. William Kinleside, pointing, at the same time, lower down the paper." Now here is no symptom of want of memory, or want of understanding or disposing mind, or any importunity used on the occasion. The witness

then speaks to the paper being read—the deceased's approbation of it, clause by clause—his little alterations—and the attestation of it; and he concludes with these words, "that the deceased thanked them several times for the trouble they had taken, and said he would now be satisfied and easy, as he had signed *Mr. Boodle's* paper."

Now this has been noticed, but really it is quite a trivial circumstance; it might be a misapprehension of the witness, for he had been informed by Mr. Wells that Mr. Boodle had been present on former occasions; or it might be a lapse of memory in the deceased making use of one name for another; for it was natural enough Mr. Boodle's name should be in the mind of the deceased on this occasion after the former transactions; but suppose his mind began to falter or wander, it was at the conclusion of the transaction, and would not affect the validity of it: indeed it does not create any doubt in the mind of the witness himself; for he goes on to depose in the strongest terms to the capacity of the deceased: he says, "he was more than usually careful to ascertain the state of the deceased's faculties, and his capacity to make the codicil, having heard it said that he was at times weak in his intellects; and that he can and does, without the least hesitation or doubt, depose that the deceased was, at and during the whole time that he was with him, which was for the space of about an hour, in full and entire possession of his mental faculties; he was of sound mind, and in every respect perfectly capable of making and executing a codicil, or of doing any act of that nature; he knew as well what he was about as any person present, as the deponent verily believes."

Mr. Ilott deposes to the capacity in these terms: "The deponent has seen the deceased on some occasions when his memory failed, but on this day there was not the least appearance of any thing of the kind; on the contrary, he enjoyed the full possession of his mental faculties, and the deponent did not, and does not, entertain the least doubt of his being in a fit state to execute a will or codicil."

Dr. Smith also deposes in terms no less strong: "That during the whole time, the deceased was, as the deponent verily believes, as perfectly in his senses as any man living; he was certainly of sound and disposing mind, memory, and understanding; well knew and understood what he said and did, and what was said and done in his presence, and was fully capable of making and executing a codicil to his will."

In a transaction so conducted by intelligent witnesses put upon their guard to observe carefully the state and condition of the deceased, the terms in which they express their opinion as to the capacity is not wholly immaterial, and they speak in the firmest manner as to their opinion; but the Court relies much more on the facts which they state than upon any opinion which they can give, and which prove to me most fully that the deceased acted freely and spontaneously on the occasion—that he conducted the whole transaction rationally;—that he well understood what he was doing;—that he fully remembered the grounds on which he acted;—and that he had a perfect and disposing mind. Mr. Wells was present upon the occasion, and fully confirms the subscribing witnesses: he was present as a friend, and at the earnest request of the deceased himself; but he takes no part whatever in conducting the business, all that is left to the deceased. Now, if what the undergardener states be correctly true, "that in ten minutes after the gentlemen were gone he saw the deceased crying, muttering to himself, and

shaking his hands backwards and forwards, and that he seemed very much distressed;" or what Mr. Wells says,—“that in the evening he saw the deceased at the door of the hot-house in the garden, which he opened, and asked him if he wanted any thing, for he appeared to be looking about him rather oddly, and did not speak to him; but came into the hot-house, and put his hands together as if in distress, and said, oh, that man, that man! almost crying at the time, and appearing to be very much disturbed.” If this be true, it is of very little weight as to the validity of the instrument which was thus executed. The exertion and anxiety of going through such a transaction as this, after the former failure, would be likely to leave him in a very nervous state, and the irritation he felt at what he considered (I am not saying rightly or wrongly) the ingratitude of Mr. Benjamin Harrison was very likely to lead him to give loose to these expressions, and to make this exclamation; but Mr. Wells says, “on subsequent occasions he recognized the act, that while he was walking in Shawfield Garden, the deceased expressed his satisfaction that that house and those premises would come to Mr. Kinleside. He believes that the deceased frequently expressed himself to the same effect; and that from the time of the execution he was generally as happy and comfortable as he had before been disquieted and wretched.”

The deceased lived nearly two years afterwards in the management of his own concerns, keeping his own accounts occasionally, and writing letters, receiving and conversing with his friends, and playing his rubbers at whist with them as well as ever.

Upon the whole then of the circumstances of this case, I must proceed to pronounce for the validity of these codicils, and which I pronounce with a firm moral conviction on my mind, that the Court will be giving effect to the wishes and intentions of a capable testator.

There is one point however that still remains, which has been a good deal pressed in argument, and upon which alone I have entertained considerable doubts; and upon that point I confess I have entertained considerable doubts. It is the question of costs.

It is the duty of the Court to repress vexatious litigation as well as malicious charges; and if satisfied that those grounds for costs exist in this case, the Court will be bound not to shrink from the discharge of its duty. Mr. Benjamin Harrison was irritated at those imputations which had been made against him in respect to Mr. Malin's affairs; he was perhaps disappointed at the revocation of the benefits intended him under the will; his mind was therefore prepared to receive, and, I do think, that he has lent rather too ready an ear to stories brought to him of the deceased's incapacity, of false and fraudulent excitements, and iniquitous proceedings. But though he was incautious in allowing himself to give way to such suspicions, yet it must be recollected that these transactions took place after he had left Widmore, and as the law terms it, “behind his back;” and it must more especially be recollected, that upon three different interviews a most respectable solicitor, the confidential solicitor of the deceased, was of opinion that the deceased was not at those times possessed of a testamentary capacity; and when it is still further recollected that it is through the agency of the person benefitted that the instrument is drawn up, by his own solicitor, who had not access to the deceased for the purpose of taking

the instructions:—Under all these circumstances it is rather too much, I think, for the Court to conclude that Mr. Benjamin Harrison may not sincerely have believed the truth of the case which he set up in his allegation.

It was pressed upon the Court that the line of argument assumed by counsel rather tended to show a continuance of that same sort of feeling on the part of Mr. Benjamin Harrison; this, I must say, would be a very dangerous ground for costs. The interests of justice are involved in the free discussion of cases at the bar; this would be much checked if such a circumstance were made the foundation of costs. The Court highly applauds and strongly recommends the observance of a liberal and honourable forbearance, even towards adverse parties, and still more towards respectable witnesses who may be under the necessity, and as matter of duty are bound to give evidence; but the Court can at the same time with truth and great satisfaction declare, that in no tribunal is that liberal forbearance more attended to than in these Courts; it is due to the learned advocates in this case, more particularly pointed at, to say, that the attack did not appear to be wantonly made, nor were the observations pushed beyond the fair limits of free discussion. The pressure of the case required them to endeavour to take off the effect and weight of the evidence of this witness, in order to set up the credit of that witness on whom the Court has repeatedly declared it cannot place any reliance; and this gentleman himself, I am sure, is too liberal and enlightened to feel permanently hurt at any thing which took place in the cause. At all events it is my duty to repeat, there is nothing in my judgment which attaches any sort of dishonourable reflection upon his character or conduct in these transactions, or upon the perfect integrity with which he has given evidence in the cause; but taking all the circumstances together into my consideration, I do not think this is a case in which I am called upon to give costs.

DENNY v. BARTON and RASHLEIGH.—p. 575.

A letter established as a codicil to a will of a date subsequent to the letter.

WILLIAM HARRIS of New Alresford, in Hampshire, died in May, 1817, possessed of about 24,000*l.* personal property, leaving a will dated 13th of March, 1812, and a codicil of the 26th of October, 1815. Probate of both these instruments was granted in common form in July, 1817, to Charles Barton and Jonathan Rashleigh, two of the executors named in them.

A second codicil was now propounded in an allegation by Louisa Denny, a natural daughter of the deceased—the codicil was in the shape of a letter dated in June, 1808, and addressed and endorsed as follows:—“*To Joseph Leacock, Esq. not to be opened until after the death of William Harris, Esq.*” Joseph Leacock was a nephew of the deceased’s, and the residuary legatee and one of the executors under the will which had been proved; but he was in the West Indies at the time of his uncle’s death;—and had died before he had arrived in England:—in the will there was a clause revocatory of all former wills.

The letter was as follows:—

“My dear Joe.—I find I am not long for this world; and shall, therefore, disclose to you a secret which is known to very few, though Mrs. Harris is acquainted with it. I have a natural daughter, by the name of Louisa Denny, who is now a teacher at a lady’s boarding school, at Hampstead: the name of the governess who keeps the school is Scriven. I have bred up this girl with care and attention, and have given her a good education. I have not mentioned her in my will, because the world should not know of my indiscretion; but I desire you (to whom I have left all my property) to pay within six months after my decease, to this young lady, one thousand pounds sterling, or allow her an annuity of fifty pounds per annum, from the day of my death. I further desire you will pay to her mother, whose name is Sarah Whitear, living in East street, in the town of Alresford, with her mother as a mantua-maker, an annuity of twenty-five pounds per annum, from the day of my decease, in quarterly payments. I have always found you to be a good lad; and I trust, as a man of honour, you will attend and follow the directions I have here given you, in the same manner as though contained in my will. My friend, Captain Sealy, who lives at No. 19, Guildford street, will give you further information respecting Louisa. God bless you, my dear Joe. I am your sincere friend and affectionate uncle, WILLIAM HARRIS.

“P. S.—I have a little money in the three per cent. consolidated funds which will enable you to discharge the above legacy and annuity.
June, 1808.”

Phillimore and Dodson in opposition to the codicil.

Swabey and Lushington in support of it.

JUDGMENT.

SIR JOHN NICHOLL.

There is no doubt in this case. The codicil is in the form of a letter: but it is quite clear that the deceased intended it to be a confidential trust to his nephew not to be communicated till after his death. It was intended to operate independently of his will. I should not consider it irrevocable; but I think a will with a common revocatory clause would not revoke this paper. There have been a variety of instances in which papers of this sort have been admitted to probate. It was found uncanceled and unrevoked; and it has only been in consequence of the nephew’s death that it has been necessary to bring it before the Court.

I am clearly of opinion that it can operate; and that it was not intended to be revoked, notwithstanding the revocatory clause in the will; and, therefore, I admit the allegation.

ABBOTT v. ABBOTT.—p. 578.

Where there has been an administration pendente minore ætate, and the minor coming of age takes upon herself the administration, she is obliged to give security to the same amount that the administrator did in the first instance.

ARCHES COURT OF CANTERBURY.

An appeal from the Consistory Court of Llandaff.

MORGAN v. HOPKINS.—p. 588.

A party not to be pronounced in contempt at the same time that his answers are held to be insufficient.

REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
ECCLESIASTICAL COURTS,
AT
Doctors' Commons;
AND IN THE
HIGH COURT OF DELEGATES.

By JOSEPH PHILLIMORE, LL.D.

VOL. III.

**CONTAINING CASES FROM TRINITY TERM, 1818,
TO MICHAELMAS TERM, 1821, INCLUSIVE.**

CASES
ARGUED AND DETERMINED
 IN THE
ECCLESIASTICAL COURTS,
 AT
Doctors' Commons;
 AND IN THE
HIGH COURT OF DELEGATES.

PREROGATIVE COURT OF CANTERBURY.

SATTERTHWAITE v. SATTERTHWAITE.—p. 1.

Probate granted in 1808, of an imperfect codicil, revoked.

JOHN SATTERTHWAITE, of Lancaster, died in 1808, leaving a widow, a son who had just attained his majority; and several children who were minors—his will bore date 20th of May, 1797; and a codicil in the hand-writing of the deceased, was found in an iron bookcase where he usually kept his papers of moment and concern, of which the following is a copy.

“Whereas, I the above named John Satterthwaite have, by my above written will and testament, bearing date the twentieth day of May, one thousand seven hundred and ninety-seven, constituted and appointed my brother-in-law Joseph Rawlins one of the trustees and executors of my said will, and he being about to go to the West Indies. Now I do by this writing, which I order to be received and taken as a codicil to my said last will and testament, declare that the said Joseph Rawlins shall not be a trustee or an executor of my said will, but that

of

in the county of

shall be a trustee and executor in the room and place of the said Joseph Rawlins, and that the said shall have and be seized of all the estates, trusts, powers, and authorities as trustee and executor thereof, as if he had been originally named therein, instead of the said Joseph Rawlins; and the authority of the said Joseph Rawlins shall from hence be at an end.

“I also order and direct that all sums of money already charged, or hereafter to be charged in my own hand-writing in my ledger to the debit of any of my children, shall be considered an advancement to them respectively, and shall be deducted from their portions respectively. I hereby confirm my said will in all other respects, and

direct this codicil to be taken as part thereof. As witness my hand
and seal the day of , in the year one
thousand eight hundred and

"Signed, sealed, published, and declared, by the said John Satterthwaite, as a codicil to his said will, in the presence of us,

JOHN SATTERTHWAITE."

On the 21st of April, 1808, probate both of the will of the 20th May, 1797, and of this testamentary paper, was granted by the Consistory Court at Lancaster, to the executors named in the will, upon affidavit made by one person to the hand-writing of the codicil; and the original papers were deposited in the registry of that Court. On the 21st of April, probate was granted to the same executor by the Prerogative Court of Canterbury, upon an office copy being exhibited of the will and codicil, and of the affidavit of hand-writing deposited in the registry at Lancaster.

On the 4th of January, 1817, a citation issued from the Prerogative Court of Canterbury, at the instance of Rawlins Satterthwaite the son, and one of the residuary legatees of the deceased, against the executors, calling upon them to bring in the probate, heretofore granted under the authority of this court, and to prove the codicil by witnesses in solemn form of law, or to show cause why probate of the will should not be granted to them without the codicil.

The probate was brought in, and the codicil was propounded by the executors, and extracts from the deceased's ledger were exhibited, to show that he had made advances to his eldest son, which it was contended might be considered as deductions from his share of his father's estate.

Swabey and Gostling in support of the codicil.

Phillimore and Lushington contrà.

JUDGMENT.

Sir JOHN NICHOLL.

The party is called upon to prove a codicil in solemn form of law—he has propounded, and undertaken to prove it;—a question has been made whether the party proceeding has not harred himself by his long acquiescence from objecting to the validity of the paper;—but if he had any ground of this kind to bring forward, he should have appeared under protest.

The case comes on upon the answers of the party, which deny all the facts pleaded in the allegation in support of the paper.—It is true there may be difficulties,—whose fault is this, but that of the party who has taken the probate without propounding the instrument? If evidence has been lost, it is owing to his own mode of proceeding.—All that I can decide upon the answers is, that it is an imperfect paper;—its leading object seems to have been the appointment of an executor and a trustee;—another object was that of directing certain monies advanced to his children to be taken as a part of their respective portions;—there is an attestation clause, but there are no witnesses to it.—It is impossible to hold this to be any thing but an imperfect paper;—it is alleged that it was found within the will,—that fact is denied.—I think upon the face of the instrument it was never intended to be executed, it is only a draft of something which was intended to be copied over on the will itself;—the expressions,—*I the above named—the above written will*—most

manifestly show it to have been a mere draft;—he does not fill up the blanks or date it, or copy it on the will;—it was not his intention to execute this paper, he had subscribed it either inadvertently, or else to authenticate his approbation of it as a draft;—this may be conjectural, but the law presumes it.—The party setting it up must satisfy the Court, that it was the intention of the deceased that it should operate in its present shape: it would require very strong evidence to satisfy me of this; neither its substance nor its form was complete.—The presumption is that it was an abandoned paper—the answers, so far from admitting any intention in its favour, state that the deceased had abandoned it, and explain that it was written under feelings of irritation which were afterwards removed.

Under these circumstances the case is beyond all doubt, and I pronounce against the paper.

HIGH COURT OF DELEGATES.

DUNN v. DUNN.—p. 6.

(An appeal from the Arches Court of Canterbury.(a))

The conduct of a husband not such as to bar his right to be divorced from his wife on account of her adultery.

THE Judges who sat under this Commission were,

Mr. Justice ABBOTT,	Dr. COOTE,
Mr. Justice BURROUGH,	Dr. PARSON,
Mr. Baron GARROW,	and
Dr. ARNOLD,	Dr. Jesse ADDAMS.

The cause was heard on the same evidence as had been adduced in the court below.

Dr. Swabey, Dr. Dodson, and Mr. Peake, for Mrs. Dunn.

We do not deny so much the evidence of the adultery: but we contend that the husband is to make proof of it in such manner as not at the same time to implicate himself. He is not to have his remedy unless he comes into Court with clean hands;—the pleadings lead to the consideration of the conduct of the husband;—it amounts to a condonation of the adultery;—he receives his wife at Dover with facility, there was no inquiry into her conduct, his behaviour has a tendency to encourage the adultery which it has been contended took place. It has been said, the husband has forgiven upon contrition, but where is the proof of any contrition?—his conduct leads to encourage a repetition of the crime;—if the injury done to the complainant is owing to his own conduct, he is not entitled to his remedy. It would encourage immorality were it otherwise, and this was the ground of the judgment of the Court below.

Mr. Warren, contra.

The arguments on the other side seem to infer a connivance of the

(a) Ante, p. 280.

husband; if the Court is satisfied that there was such, he is not entitled to his divorce;—we contend, however, that there is no proof of connivance, though there may be proof of abundance of folly on the part of the husband;—there is no previous connivance, the elopement does not appear occasioned by his act or negligence.—I rely on Mrs. Papp's evidence to the sixth article.

Grant says, she desired him not to tell her husband that Clay was with her at Calais; this is important, as showing that there was no connivance: we contend this is what she told her husband. Suppose she said she had never been with Clay;—there was no reason in desiring Grant not to tell it. The mother never speaks to him on the subject afterwards; he stops her;—it is plain it was not the conversation of contrition;—it must have been that she was not with Clay. He writes to his sister that she was innocent;—if she represented herself as innocent, there was no case for contrition. The mother tells nothing to the husband.

Per Curiam.—Mr. Baron GARROW.

For the best reason, because the husband stops her.

Per Curiam.—Mr. Justice ABBOTT.

Suppose the adultery proved, and that it was easily forgiven, show the legal consequence.

Mr. Warren.

I will put first an extreme case;—a young man and woman married;—adultery committed and forgiven—that there is adultery again;—he is entitled to his remedy.—Condonation, if there is subsequent adultery, is no bar;—to bar they must show connivance;—a man may forgive his wife without satisfactory reason if he pleases: but such a man is entitled to his divorce, if his wife commits subsequent adultery.—I see folly here, but no connivance; conduct depends on a man's understanding, and on various circumstances.

Per Curiam.—Mr. Baron GARROW.

She curses her paramour, and blesses her husband, to whom she then means to return.—Having found an easy reception before, she expects it again, but soon repents; and the messengers cross between her husband and her paramour.

Mr. Warren.

This is inconsistent with her husband's having led her into adultery; there is nothing on which they can build connivance, but on the facility of forgiveness;—there is no counterplea;—there is nothing which would lead the husband particularly to plead his own conduct. If they could show conversation by which she pleaded her having children, and promising better conduct,—he would still be in a situation to demand a divorce on subsequent adultery after condonation.

Dr. Jenner on the same side.

It cannot be argued that condonation is a licence to commit adultery; but it will be argued that the facility of the husband in the first instance has led to the wife's second guilt. I do not know that it is any where exactly laid down, what conduct shall be shown on the part of the husband, to entitle him to a divorce on a second adultery. Here they had not long been married; there were two children;—the presumption is that they lived on terms of affection;—nothing of connivance or inattention in the first elopement; it is unfortunate that the mother of the wife was the only witness to her conduct.

If there was any evidence of negligent conduct of the husband after

condonation, the case would be different.(a) Sanchez, lib. 10. Disput. 5. No. 19, 20.(b) What was the conduct of the husband on hearing of the second elopement? He turned pale immediately; then he did not expect it.

The doctrine is, that the husband, having occasioned the adultery of his wife by his own conduct, shall not complain of it: here it must be held that facility of condonation is a bar, as occasioning adultery.

No rule for the condonation of the husband is laid down by law.

Dr. Swabey in reply.

His mode of reception after her elopement was an encouragement to adultery, and his excessive fondness and fatuity. *Fatuus est qui meretricem retinet.* The law does not administer justice in such cases. The law books look with great jealousy to condonation. We prove that the husband's conduct constructively produced the adultery.

The Judges Delegate pronounced for the appeal, and reversed the sentence of the Court below.

(a) *Ultimus casus est quando conjux innocens alteri condonat adulterium, et sic reconciliantur. Cum enim divortium sit in favorem innocentis, potest innocens, cedere jure suo, delictumque condonare, et sic cessabit jus divortii: hæc autem remissio est duplex quædam expressa, quando scilicet verbis expressis innocens conjux adulteram sibi reconciliat condonans delictum, &c. alia autem est remissio tacita, &c. Sanchez, lib. 10. D. 5. 19, 20.*

(b) *Id tamen observandum est, si reconciliatione factâ conjux ille reconciliatus in adulterium relabatur, posse non obstante priori illâ reconciliatione, de novo eo adulterio illum accusari, et ratione illius celebrari divortium. Sanchez, lib. 10. D. 5. 20.*

ARCHES COURT OF CANTERBURY.

HAWKINS and COLEMAN v. COMPEIGNE.—p. 11.

By the general law, there can be no personal property in pews. Sentence of the Court at Winchester, reversed.

ANDREWS v. LITTON.—p. 18.

Sentence of an inferior Court in a tithe-cause reversed.

PREROGATIVE COURT OF CANTERBURY.

MANSFIELD v. SHAW.—p. 22.

The executor under a former will, has a right to put the executor of a latter will upon solemn proof of that instrument, and to interrogate his witnesses: but if he goes beyond this without being able to prove his case, he becomes liable to costs.

JUDGMENT.

SIR JOHN NICHOLL.

The evidence leaves no possible doubt as to the case, and the ques-

tion is narrowed to the consideration of costs,—and on this point I have no doubt from the conduct of the party, and the complexion of the cause.

Immediately on the death of the deceased the adverse party, though he knew of the existence and validity of the latter will—obtains probate of the former will—takes the executor's oath—gets possession of the house and property, and has continued in it ever since.—The probate was very soon called in;—if he had made candid enquiries, and candidly considered, he could have entertained no doubt.

The law gave him the right to call upon the executor to propound his will “in solemn form of law,” and to interrogate the witnesses:—but he went further, and pleaded what he must have known he could not prove.

There was no “just cause of litigation” to go to the extent he has gone. I think I must in justice give those costs against him, which have arisen from the admission of his allegation.

THOMAS v. WALL and Others.—p. 23.

A codicil unsigned, and having an attestation clause unattested by witnesses, admitted to probate.

ISAAC PADMAN died on the 30th of August, 1818, leaving a formal will, dated 29th July, 1816, and a testamentary paper signed, and having an attestation clause to which there were no witnesses. The will was not disputed—the testamentary paper was propounded as a codicil under the circumstances set forth in the following judgment.

JUDGMENT.

SIR JOHN NICHOLL.

The will is in the hand-writing of the deceased—it is dated, executed, and attested by three witnesses—the codicil is also in his hand-writing, but it is not signed, nor attested; it is propounded by Mr. Thomas, and opposed by the executors. The allegation states, “That after the deceased had executed his will, the Rev. Thomas Hampaye, one of the persons he had named executor, told him that he wished to decline acting, and that the deceased in consequence was desirous of annulling his appointment as executor of his will, and substituting another in his stead; and also wishing to make other alterations in his will, some time in the year 1817, the time more particularly the party propounded cannot set forth, did draw and write the codicil exhibited in this cause, and placed the same together with his will, in the envelope in which he had before placed the will alone, and altered the endorsement by crossing with his own hand the names and words ‘Rev. Mr. Hampaye,’ and ‘November,’ and inserting over the same the names and words on ‘the Rev. Mr. Thomas,’ and ‘July;’ and then deposited the codicil enclosed in the envelope in an escrutoire in his bed-room.”

The codicil is fairly written,—it is all in the deceased's hand-writing;—strong reasons are given for the change of the executor—it was deposited with his will, and endorsed;—there is no doubt, I think, but that the deceased intended it should operate; certainly on the face of it, it is an imperfect paper, but the presumption against it is slight; therefore, slight circumstances will remove it.

The second article pleads, that on the 24th of August last, being six

days before his death, Mr. John Davis, one of the executors named in the will, called on the deceased, and was introduced into his bed-chamber; that the deceased was then lying on his bed, in a very weak and enervated state; that he requested his wife who was then in the room to take out his will from the cabinet in the said room, who then immediately produced to Mr. Davis from such cabinet the packet containing the will and codicil; and Mr. Davis, at the request of the deceased, then read the said will and codicil all over to him audibly and distinctly in the presence of his wife, and then asked him, "if he thought there could be any cavil;" who replied, he thought not if the codicil were signed, whereupon the deceased who was then very ill, and could not sit up without pain and difficulty, his disorder being an enlargement of the kidneys, said if he got better he would write it all over again; on which Mr. Davis advised him to do nothing with his will in his then state, he being then, as he had been and continued to be, in the most acute pain from his disease; and that the deceased's wife then at his request replaced the papers in the cabinet, and the deceased soon after such conversation fell into a doze. The third article pleads that from this time the deceased grew gradually worse till his death, and was continually when awake in the most excruciating pain, and incapable of conversing for a few minutes, without experiencing the utmost bodily suffering; and in consequence of pain, and the effects of opium, his mental energy was destroyed, and in this state he continued till his death.

If these facts should be proved, the presumption of law will be completely repelled. There is an anxiety of the deceased that the codicil should operate, but he was in too much pain to attempt to sign it;—he attempts to write it over again; these are strong marks of his adherence to it.

If these circumstances are fully proved, there can be no doubt.

The allegation was admitted(a).

(a) The facts stated in the allegation being known to be correct, no further opposition was made by the executor; and the codicil was admitted to probate on the 9th of December, 1818.

HOOTON and DICKENS v. HEAD.—p. 26.

A former will not revived by the cancellation of a will of a subsequent date.

JUDGMENT.

SIR JOHN NICHOLL.

On the facts of the case there is no contrariety of evidence;—the deceased died a bachelor;—he had made several wills, and it was his habit when he made a new will to cancel the former one. On the eighteenth of November, 1816, he called at the house of Mr. Day, his solicitor, who was not at home; but Mr. Moore, the confidential clerk, attended upon him, and undertook his business under circumstances which he states in the following manner: "Mr. Day being in London, the testator communicated to the deponent his wishes and intentions respecting some alterations he proposed to make in his will; the deponent thereupon (having access to all the said Mr. Day's papers) produced the

deceased's then existing will to him, which, to the best of his recollection and belief, bore date some time in the year 1815, and which had been formed by the said Mr. Day of the three first sheets of a former will, executed by the said John Head the testator, sometime in the year 1809, and of the three sheets in his the said Mr. Day's own hand-writing in continuation; the deponent then read the said will all over to the said testator; and as the said John Head, the testator, explained to the deponent as he read the same, the alterations he was desirous of making in his said will, (one of which he well remembers was to alter the bequest of one moiety of the clear residue of his the testator's personal estate, which by his then existing will he had given his sister Ann Hooton, wife of the said Daniel Hooton, a life interest in only, and the principal immediately after her decease, equally between all the children of his said sister Ann Hooton, except her sons John Head Hooton and William Hooton, so as to give the said moiety, or said clear residue of the testator's said personal estate, to his sister Ann Hooton, and her husband Daniel Hooton, absolutely) he made such alterations with a pencil in two of the latter sheets of the then existing will, as he read the same to the testator, and received instructions from him for that purpose so as to make the same agree with the wishes and intentions of the testator; for the aforesaid three first sheets of the then existing will, not requiring any alterations to be made therein, as the testator was not desirous of making any alteration in the devises to which the same related, he the deponent took the three first sheets of the then existing will, as a part of the will which he then formed for the testator, agreeably to his wishes and directions; and then having made the several alterations in ink which he had previously made only with a pencil in the two sheets of the then existing will, agreeably to the testator's intentions, and having caused the sixth or concluding sheet of the will, which he was then forming in manner aforesaid, to be written by James Day (another clerk in the office) whilst he was engaged in writing the aforesaid alterations in ink, in the two sheets of the former will, he the deponent then, in the presence of the testator, cut off the names of the subscribing witnesses appearing, as well in the margin of the three first sheets of the former will, as also in the margin of the two latter sheets thereof, which were as aforesaid in Mr. William Day's own hand-writing, but did not cut off the testator's name from the three first sheets as the same now appear cut off from the same, and as is pleaded in the said first article of the said allegation; for the testator's name had already been cut off therefrom, at the time when Mr. William Day had, as is predeposed, taken the three first sheets from a former will executed in 1809, to make the same serve as a part of the will, which the deponent altered in manner hereinbefore set forth, on the 18th Nov. 1816; and which the said testator had executed in the year 1815, as he the deponent also believes; and the deponent further saith, that having in manner hereinbefore mentioned formed a temporary will for John Head the testator; for it had been settled and agreed upon between the testator and the deponent that a fair copy was to be made thereof by the following Wednesday, being the 20th day of the said month of November, and that the deponent was to attend him the testator therewith, on that day, to see him execute the same. He the deponent then read the said paper writings to the testator, who perfectly well knew and understood the same, and approved thereof; and in order

that he might not be without a will during the time required to get the same engrossed as aforesaid fair for execution (viz. till the Wednesday following) he expressed a desire to execute the same; and the deponent having thereupon called in his fellow subscribed witnesses to the said will, Mr. James Day and Mr. George Palmer Edis, who were then also clerks in the said Mr. William Day's office, to attend and see the testator execute the said intended temporary will; and they having accordingly come for that purpose into that office, where the testator and the deponent then were, he John Head the testator, then in the presence of them the said James Day, George Palmer Edis, and the deponent, traced over his name with a dry pen, which had been set and subscribed at the foot or the bottom of each of the said first five sheets, now forming a part of the will propounded in this cause, previously to the same being applied to such use, (for the same had been so subscribed by the testator, at the time they were made a part of his former will in the year 1815, as the deponent verily believes, and hath not the least doubt) and he then, that is to say, on the 18th Nov. 1816, also set and subscribed his name 'John Head' at the conclusion of the clause written on the back of the fourth sheet of the will; and also at the conclusion of the last sheet of the said will, in manner and form as now appears therein, and when he had so done, he sealed, published, and declared the paper writings contained in the said six sheets of paper, as and for his last will and testament; and requested them the said Mr. James Day, Mr. Edis, and the deponent, who were present during the transaction, to be witnesses to the execution thereof in the usual manner and form, for which purpose the deponent made use of or dictated the words commonly used on such occasions, and the testator either repeated or adopted the same; and then the said Mr. James Day, Mr. Edis, and he this deponent respectively set and subscribed their names to each sheet of the said will, and also on the back of the fourth sheet thereof, where there was a clause subscribed by the testator as aforesaid, as witnesses to the execution of the said will, soon after which being done, the testator went away, leaving the will with the deponent, for him to get a fair copy thereof made for him to execute on the Wednesday then next following, when the deponent was to have attended him therewith for that purpose."

Thus Moore states a temporary will was formed in order that the deceased might not be without a will, till a more formal will was executed;—it was rather an executed draft from which a will was to be prepared, than a will.—On the 22d of November, he met Mr. Day at Kimbolton Market, who appointed him to come to him on the next day. On the 23d he made a will including the usual revocatory clause; there were some slight alterations, but generally the bulk of the will was the same.

Mr. Day is not certain that he carried the will of the 18th with him, but he does not venture to state that he called it to the mind of the deceased as an existing will.—A month afterwards the deceased sends for Day, and executes a codicil by which he revoked a legacy of 200*l.* and his furniture to Mrs. Potter his housekeeper who had offended him, and left her only 100*l.* The deceased twice sent for his will, which Day had taken away with him, but did not obtain it;—he then got a Mr. Harrison to write a paper revoking the 100*l.* legacy to Mrs. Potter;—he being jealous of Day for not having pursued his direction re-

goes away;—he does not fall within the late act;—and I
 remedy than that the administration should be revoked,
 should retract his renunciation, and be allowed to take
 otherwise great loss might accrue, and injustice
 Court has greater authority over an administra-
 granted to a creditor, than over an adminis-

OF LONDON.

HERBERT.—p. 34.

foreign country objected to because
 en. Objection overruled.

, a requisition issued from the Consis-
 ssed to His Britannic Majesty's Consul
 the judges and magistrates, civil and ecclesias-
 alermo, or in any other place or town in Sicily,
 atly or severally to take the depositions of the wit-
 on a libel given in by Lady Herbert, in a suit brought
 her husband, for the restitution of conjugal rights. The
 having been completed, the requisition was returned: but
 on was now taken to that return; because, as it was alleged,
 positions of the witnesses had not been taken *secretly*, but in the
 sence of Don Camillo Gallo, acting as a substitute for Lady Her-
 bert's proctor.

Arnold and Swabey for Lord Herbert

Contended that all the proceedings had under the commission were
 invalid, and that the depositions must be quashed.

Phillimore and Lushington contra.

JUDGMENT.

SIR WILLIAM SCOTT.

The present question arises upon an objection made to the return of a
 commission to examine witnesses in Sicily touching the marriage of
 Lord Herbert with the Princess of Butera. The commission issued
 from this court; and was directed to the English Consul in Sicily, and
 to the civil and ecclesiastical judges in that country: it was accepted by
 one of the judges at Palermo, and his Britannic Majesty's Consul Gen-
 eral.

It is objected that many irregularities took place, which are not
 pressed upon the consideration of the Court. One however is, viz. that
 the commission was not executed according to its own proper form and
 directions, and that it is clear that it ought to have been executed ac-
 cording to its own form as delegated, and not according to considera-
 tions arising out of the law of the country in which it was executed;—
 the evidence was to be *secretly* taken;—but that it was not so:—for the
 substituted agent of the Princess of Butera was present, which was a
 violation of the secrecy enjoined. On this ground the commission is
 said to be vitiated, and it is prayed that the return should be quashed.—
 Undoubtedly, if the Court had reason to believe that this error had led

specting Mrs. Potter. The deceased agreed to send for the doctor; he executed two codicils which he sealed up; and being anxious to prevent Day from carrying them away with him, he locked them up in an iron chest. The deceased felt dissatisfaction at the disposition of his property, and on the 29th of December, 1817, he put his will and the codicils into the fire intentionally and deliberately. The will of the 18th of November remained in possession of Mr. Day.

The question for the Court is, whether, upon the destruction of this second will, the first was revived or revoked;—this description of question has frequently arisen, and been repeatedly agitated. In some cases it has been contended that the former will is so far revoked, as to require some act of revival; in others that the mere preservation is sufficient to revive it. In *Glazier v. Glazier*, Burrows, p. 2512, both instruments were in possession of the deceased;—though the dicta thrown out are adverse to the necessity of an act of revival.

The clear result of all the cases, the common sense of them, is that it must be ascertained whether it was or was not the intention of the deceased, that the will should stand; and in a late case, Vol. I. p. 375, *Moore v. De La Torre*, the delegates seem to have come to the conclusion that it was to be considered as a question of intention.

In the present case it is unnecessary to decide in the absence of circumstances on which side the presumption lies;—it is unnecessary to consider the balance of presumption which might turn the scale, because there is no doubt from the circumstances.

This was not considered as a formal will, but as a draft; and as such would be done away when the will made from it was executed. When he destroyed the latter will, it is not probable that he meant to revive the other, any more than that it is probable that a person by destroying a will means to revive the draft. To suppose that he meant to revive the legacy to Mrs. Potter would be to go in the teeth of all the evidence. Assuming it to be a formal regular will, yet it being the practice of the office to cancel wills when a later one was made, the deceased naturally would suppose it cancelled; it seems never to have been in his contemplation since he executed it;—it was never brought to his notice;—if the evidence of it is correct, he said he had no other will;—when he destroys his will there is no declaration that he had a formal will;—all his declarations at the last were that if he did not make a new will, he would have none. His declarations also were, that his property would go away amongst all his relations;—unless we are to discredit two witnesses, he repeatedly declared that his mind was easy, that now he had no will. He could, therefore, have had no intention whatever, when he destroyed one, of reviving the other; and I think I am bound to pronounce against the will, and for an intestacy.

The costs of both sides were directed to be paid out of the estate.

In the goods of JENKINS deceased.—p. 33.

Administration granted to a creditor revoked, he having settled his own debt and gone away.

Per Curiam.

A creditor having obtained an administration, and completely settled

his own debt, goes away;—he does not fall within the late act;—and I see no other remedy than that the administration should be revoked, and the executor should retract his renunciation, and be allowed to take probate of the will; otherwise great loss might accrue, and injustice might be done. The Court has greater authority over an administration with the will annexed, granted to a creditor, than over an administration under the statute.

CONSISTORY COURT OF LONDON.

LADY HERBERT v. LORD HERBERT.—p. 34. ^{291.363-7.}

Depositions taken under a requisition in a foreign country objected to because they had not been *secretly* taken. Objection overruled.

On the 5th of December, 1817, a requisition issued from the Consistory Court of London, addressed to His Britannic Majesty's Consul General in Sicily, and to the judges and magistrates, civil and ecclesiastical, in the city of Palermo, or in any other place or town in Sicily, requesting them jointly or severally to take the depositions of the witnesses, produced on a libel given in by Lady Herbert, in a suit brought by her against her husband, for the restitution of conjugal rights. The examination having been completed, the requisition was returned: but an objection was now taken to that return; because, as it was alleged, the depositions of the witnesses had not been taken *secretly*, but in the presence of Don Camillo Gallo, acting as a substitute for Lady Herbert's proctor.

Arnold and Swabey for Lord Herbert

Contended that all the proceedings had under the commission were invalid, and that the depositions must be quashed.

Phillimore and Lushington contra.

JUDGMENT.

SIR WILLIAM SCOTT.

The present question arises upon an objection made to the return of a commission to examine witnesses in Sicily touching the marriage of Lord Herbert with the Princess of Butera. The commission issued from this court; and was directed to the English Consul in Sicily, and to the civil and ecclesiastical judges in that country: it was accepted by one of the judges at Palermo, and his Britannic Majesty's Consul General.

It is objected that many irregularities took place, which are not pressed upon the consideration of the Court. One however is, viz. that the commission was not executed according to its own proper form and directions, and that it is clear that it ought to have been executed according to its own form as delegated, and not according to considerations arising out of the law of the country in which it was executed;—the evidence was to be *secretly* taken;—but that it was not so:—for the substituted agent of the Princess of Butera was present, which was a violation of the secrecy enjoined. On this ground the commission is said to be vitiated, and it is prayed that the return should be quashed.—Undoubtedly, if the Court had reason to believe that this error had led

to important consequences in polluting the evidence, it would, however unwillingly after the length of time this cause has lasted, and the several obstructions that have been given to it, resort to the measure of sending out a new commission:—but if there should be reason to believe that the irregularities arose from mistake, and from the misapprehension of a word which might easily be mistaken, and that the judges had in all other respects acted duly, I think I should depart from my duty if I did not allow the evidence to be inspected before I pronounced against it.

The commission went out with an order that the witnesses should be examined secretly, such is the form and rule of the canon law, by the judge in the presence of a notary public.—Our own municipal law holds a different practice;—it is to be observed, however, that the secrecy enjoined by the civil and canon laws is varied by the local regulations of different countries: it is not interpreted exactly the same in any one country as in another.—In this country it is not the practice for the judge in person to take the examination of witnesses;—but it is confided to an examiner who examines secretly.—In the present case the office of examiner has been performed in a more dignified manner by one of the chief magistrates of the country, and one of the representative functionaries of the English government: there is therefore some security here that all has been rightly done.—I must admit that, supposing the word *secretly* to have been rightly understood, the witnesses ought to have been examined according to the authority given by those who delegated it;—but I accede to the observation that *secret* is an ambiguous word, and I do not wonder that it led to a mistake which it may be proper to guard against in other requisitions sent out to foreign countries. There are different degrees of secrecy:—a tribunal is *secret* where it is held *januis clausis*;—another species of secrecy is where none but the judges and parties only are present;—another where the judges only are present.—I do not wonder when this commission came into a country where they are used to examine witnesses *januis clausis*, where they exclude a public and general auditory, taking the evidence with the judge, notary and representative of the parties only present, that they might easily think they had done right in taking the depositions as they have done;—it is natural they should so explain the word *secret*;—there is no reason to consider it as an intentional perversion.—In these commissions, which go to foreign countries, I think it may be hereafter necessary and proper to throw in some words which may prevent such a misconception as naturally seems to arise from our own practice. Arising as it does in this instance from natural misapprehension, it does not impress this Court with any suspicion: it is clearly an impression existing on the minds of all parties.—Don Martini, the substitute for Lord Herbert, complains that he alone was not admitted: the notion is merely taken up by counsel here, that he objected on any other ground. Where all parties act under this natural mistake, it is not necessary that I should consider the evidence as unduly taken and vitiated, before we examine that evidence.

I think I have great security in the character of the persons who presided at these examinations; and from the nature of the suit, which goes rather to the adjudication of a point of law, than of a question of fact.

Looking to all these considerations, I cannot say that the depositions must be quashed as unfairly taken: I think this evidence may serve as the basis of a sound judgment.

ARCHES COURT OF CANTERBURY.

BRISCO v. BRISCO.—p. 38.

2d 295.

Court of Appeal on an appeal from a grievance, cannot enforce the payment of costs incurred in the inferior court.

CONSISTORY COURT OF LONDON.

JOHNSTON v. PARKER, falsely called JOHNSTON.—p. 39.

A marriage solemnized by licence in 1796 declared null and void.

ARCHES COURT OF CANTERBURY.

HAYES, falsely called WATTS, v. WATTS.—p. 43.

A marriage pronounced null after a cohabitation of eighteen years.

SULLIVAN v. OLDACRE, falsely called SULLIVAN.—p. 45.

Publication of the banns of an illegitimate child, by the surname of the mother as well as by that of the father, held to be valid.

CONSISTORY COURT OF LONDON.

Lady HERBERT v. Lord HERBERT.—p. 58.

291. 361-2.

4H. 534-41.

A clandestine marriage between an Englishman and a Sicilian woman, celebrated in Sicily, and valid by the laws of that kingdom, held to be valid also in England.

THIS suit was instituted by Lady Herbert v. Lord Herbert for the restitution of conjugal rights.

The libel consisted of eighteen articles; and pleaded in substance—

1. That Lord Herbert, a bachelor, and aged upwards of twenty-one years, while resident at Palermo, in Sicily, in the months of June, July, and August, 1814, paid his addresses to Lady Herbert, then the widow of the Prince of Butera, aged upwards of twenty-one years, and that they mutually agreed to marry each other; and that Lord Herbert, on the 17th of August, 1814, wrote a promise of marriage, and delivered it to Lady Herbert.

2. Exhibited the promise of marriage.

3. That, in pursuance of such contract, the parties on the 17th of August, 1814, were married according to the rites of the Holy Roman

Catholic Church, in the palace of Butera, in Palermo, by a priest of the parish of St. Nicholas, of Kalsa, in Palermo; and that in the presence of the said priest they expressed their own free accord and consent to be married; and the priest pronounced them to be lawful husband and wife in the presence of Michael Fardelli and Francesco Omorato, who attested the same.

4. Exhibited the certificate of the priest of the celebration of the marriage.

5. That the parish priest gave notice to the archiepiscopal Court at Palermo of the celebration of the marriage, and that such notice remains in the records of the Court.

6. Exhibited a copy of the registration of the marriage; and the identity of the parties.

7. The consummation of the marriage; and the cohabitation of the parties as man and wife, for several days in August, 1814.

8. That by the laws of Sicily, and by the decree of the Council of Trent, A. D. 1563, which is received and obeyed as law at Palermo, and throughout all Sicily, clandestine marriages are held to be good and valid; and it is enacted that the mutual and free will of the parties contracting marriage, expressed in the presence of the priest of the parish in which one of the parties resides, and in the presence of two witnesses, is sufficient to constitute the indissoluble bond of matrimony;—and that a man and woman thus married are held to be legally united in wedlock; and that this is well known to the judges, advocates, and lawyers, practising in the Courts of Law, at Palermo, or other places in the island and kingdom of Sicily of the greatest reputation for their skill and knowledge in the laws of that country; and it is in strict conformity with the exposition of the law of marriages in that kingdom as laid down in the writings of authors of the greatest eminence and authority on the subject.

9. That several ordinances promulgated in the kingdom of Sicily affix a civil punishment on persons contracting clandestine marriages; and render the husband, if of noble birth, liable to imprisonment for five years in a fortress, and the wife for the same number of years in a convent:—but these ordinances are never enforced but at the suit of the parents or guardians of parties clandestinely married; and it is the general usage of the king, at the petition of the parties, to remit the execution of the law.

10. That Lord and Lady Herbert having mutually agreed, and freely expressed their consent to be married, and having been pronounced to be husband and wife by the priest of the parish in which they resided, in the presence of two witnesses,—are lawful husband and wife according to the laws of Sicily, and are so known to be by the advocates and others professing the law in Sicily, and that this is in strict conformity with the law of marriages in that kingdom.

11. That the Earl of Pembroke, the father of Lord Herbert, arriving in Sicily shortly after the celebration of the marriage, presented a petition to the king praying the enforcement of the law against clandestine marriages; and that by the decree of the court, Lord Herbert was on the 21st of Aug. forcibly separated from his wife, and imprisoned in the fortress of Castlemare, where he remained till the 15th of November following, when he made his escape, and embarked for Genoa;—and that Lady Herbert was at the same time imprisoned in the convent of Stimati.

12. That during Lord Herbert's imprisonment, he addressed letters to Lady Herbert, in which he called her his wife, and expressed the highest love and affection for her, and fully recognized the validity of his marriage.

13. Exhibited one of these letters.

14. That after the escape of Lord Herbert, Lady Herbert petitioned the Court for her release; and in the month of January, 1815, the prayer of her petition was granted, and she then went and resided for a short time with her sister, the Duchess of San Giovanni, at Naples; and afterwards proceeded with her brother (the Duke Laurino de Spinelli,) to this country, where she arrived in March last.

15. That, notwithstanding the marriage, Lord Herbert has wholly withdrawn himself from her society.

16 and 17. Pleaded the jurisdiction of the Court.

18. Prayed that the validity of the marriage might be pronounced for; and Lord Herbert might be compelled to take his wife home, and treat her with conjugal affection, and condemned in the costs of the suit.

In support of this libel forty-eight witnesses were examined, who fully proved the allegations it contained.

Phillimore and Lushington, in support of the marriage.

Arnold and Swabey, contra,

Argued that the municipal law of Sicily having authorized a separation for five years, it was impossible for the Courts of this country to decree a sentence of restitution of conjugal rights till that period had elapsed.

JUDGMENT.

SIR WILLIAM SCOTT.

This is a proceeding for the restitution of conjugal rights, brought by the Dowager Princess of Butera, in Sicily, against Lord Herbert. The parties are of noble birth, and of elevated station in their respective countries. They were both of age at the time of the marriage;—there was no incongruity from disparity of condition or gross inequality of age. They both appear personally, and not by their guardian.

It appears that Lord Herbert was in Sicily in 1814, and introduced into the family of the Prince of Butera, the husband of this lady; whose house was much frequented by the English nobility, who were received there with great kindness and hospitality. The Prince of Butera died in June 1814—when the princess, being a widow, received attentions from Lord Herbert in a more marked and visible manner. Her sister the Duchess of San Giovanni, speaks to receiving Lord Herbert at her house, who had been before introduced to her by the Princess of Butera, and to his opening his arms and telling her that he was entitled to embrace her, as he was going to marry her sister. A contract of marriage was executed by him, which has been exhibited;—some of her friends appear to have entertained doubts as to the propriety of the marriage, in talking with her, and endeavouring to dissuade her from it, as not suitable: to whom she replied that that was a question for herself to decide; that she had a right to determine for herself. Lord Herbert continued in intimacy with her, and communicated to the friends of her family his intention of marrying her. The fact of marriage took place on the 17th of August;—it certainly was not conformable to the regular ceremonies of that country, in which, as in most other countries of Europe, solemn ceremonies are appointed. The parish priest was sent for (it

appears that he was an eminent person in that country); two servants of the family were present; and in their presence Lord and Lady Herbert taking hold of each other's hands declared themselves to be man and wife. This is said to be unsolemn: but all the solemnities which can attend an unsolemn marriage were observed. It was followed by the registration of the marriage: and nothing was left undone which the nature of the act would admit, by which the fact of marriage could be established.

The facts being so proved, the only question is respecting the validity of such a marriage,—whether it be valid according to the law of Sicily,—it being an established principle that every marriage must be tried according to the law of the country in which it took place:—this is according to the *jus gentium*: whatever the regulations may be, according to which the marriage has been had, if they are what the canonical law of the foreign country supports, the canonical law of this country must enforce it.

In proof of this witnesses have been examined, for foreign law must be established by professors of law of the country;—the law must be produced, and it must be shown to be the existing law of the country. (a) It is alleged that the decree of the (b) Council of Trent is the law of (c) Sicily, by which the presence of the parish priest and two witnesses are made requisite to the validity of a marriage; but by which clandestine marriages, though illicit, are notwithstanding valid and indissoluble. Four professors of the law experienced in the canonical jurisprudence of their country have been examined, and they express strongly their opinion as to the law.—The facts are too clear to be resisted: a communication took place between the parties by letters from each other; they corresponded as husband and wife; there is a letter from Lord Herbert in evidence, couched in the warmest and most passionate terms of conjugal affection; cohabitation had taken place afterwards till the 23d of August.

There is, it seems, a municipal and criminal law in Sicily which looks with a jealous eye on marriages of this nature;—it subjects the parties to imprisonment, the husband in a fortress, the wife in a convent. The seclusion of the parties from each other is a consequence of this: but its immediate operation is imprisonment; the law does not look to a separation *a mensa et toro*.

This law has been dormant in its execution, and I suppose is seldom resorted to: but it has been enforced on the present occasion on the application of the Earl of Pembroke, the father of Lord Herbert, who was much dissatisfied with the marriage. Lord Herbert escaped from the fortress, and Lady Herbert was afterwards released from the convent

(a) The Decrees of the Council of Trent were received and adopted in Sicily by an ordinance of Philip II.

(b) Sess. 24. c. 1.

(c) The Council of Trent distinctly recognizes the validity of clandestine marriages. *Tametsi dubitandum non est clandestina matrimonia, libero contrahentium consensu facta, rata et vera esse matrimonia, quamdiu ea ecclesia irrita non fecit; et proinde jure damnandi sunt illi, ut eos sancta synodus anathemate damnat, qui ea vera et rata esse negant; quique falsè affirmant, matrimonia, à filiis familias sine consensu parentum contracta, irrita esse et parentes ea rata vel irrita facere posse: nihilominus sancta Dei ecclesia ex justissimis causis illa semper detestata est atque prohibuit.* Can. et Dec. Con. Trid. Sess. 24. c. 1.

on giving bail to appear if called upon. She has not been called upon, and the period for which the bail was given has almost expired.

Under these circumstances the Court is called upon by the counsel for Lord Herbert not to pronounce the ordinary sentence of the law, but to pronounce that the sentence for restitution of conjugal rights shall not take place but from a distant day; on the ground of this municipal law of Sicily, which would enforce a separation for five years, I am called upon to inflict a penalty by the criminal law of this country.

It is admitted that there is no precedent for this, nor is there any principle on which it can be contended that this Court should form a principle of criminal law from a foreign country, and import it with its own jurisprudence. At whose suit too is this to be done? At the suit of the husband, who is equally involved with the wife in the offence, and who, by his counsel, now prays that his wife, in virtue of this law, may be debarred from his cohabitation. I should undertake a task, to which I am in no degree competent in point of jurisdiction, at the suit of a *particeps criminis* to put in force a law almost in oblivion in Sicily. And it is totally out of the question in this case, if I were possessed of such authority; for the time is almost elapsed.

I have no doubt on the evidence that the lady is the lawful wife of Lord Herbert, and that he is bound to receive her in that character; and I direct that he shall take her home and treat her with conjugal affection, and that he shall certify to this Court, by the first day of Michaelmas Term, that he has complied with this requisition of the Court.

Costs given against Lord Herbert.

PECULIARS' COURT OF CANTERBURY.

The Office of the Judge promoted by WILSON v. M'MATH.—p. 67.

The right of an incumbent, to preside at a meeting of his parishioners in vestry, established.

PREROGATIVE COURT OF CANTERBURY.

In the Goods of JOANNA WILKINSON, Deceased.—p. 96.

Per Curiam.

A married woman has taken probate without the consent of her husband:—the husband is now consenting to its being revoked, and she brings in an affidavit that she has not intermeddled with the effects.—I shall allow the probate to be brought in and revoked, and the administration with the will annexed to be granted to the residuary legatees.

ARCHES COURT OF CANTERBURY.

ROPER v. ROPER.—p. 97.

Two explanatory articles, in a responsive allegation, admitted.

HALFORD v. HALFORD.—p. 98.

An exceptive allegation rejected.

PREROGATIVE COURT OF CANTERBURY.

MUSTO v. SUTCLIFFE.—p. 104.

Probate granted of unfinished instructions.

JUDGMENT.

Sir JOHN NICHOLL.

In this case Mr. Sutcliffe died before his will could be prepared;—the instructions are set up;—they are in these terms:—

“To give (*a*) to Mrs. Sutcliffe all his property for life; and after her death, to give one thousand five hundred pounds to be divided equally between the children of my late brother Thomas Sutcliffe, of Bolton-le-Moor, Yorkshire; and one thousand five hundred equally between the children of my late sister Hannah, the wife of Charles Musto, of Shenfield, in the county of Essex.

“To give, bequeath, and demise, unto my wife Jane Sutcliffe all my right, title, and interest in that, my freehold messuage or tenement in which I now live, situate on the north side of New Street, Henley-upon-Thames, in the county of Oxford; and to her heirs and assigns for ever; with the appurtenances thereto belonging.”

It is sufficiently proved that the person who received these instructions was satisfied with the intention of the deceased, and used all reasonable diligence, but could not complete them before the deceased died;—this would not invalidate the instrument;—it would have the same effect as if it had been completed, provided the Court be satisfied that volition went with the act,—and that there was sufficient capacity.

The case turns on the proof of the intention at the time.—In all testamentary acts in the last stage of life, the Court looks with vigilance and jealousy to the evidence by which they are supported. On the evidence of the drawer alone there is considerable doubt as to volition. No more is proved than uniform assent on the part of the deceased to the questions put to him;—he says nothing of himself;—he answers “yes” to every thing.—While this person was writing down the instructions, Mrs. Wigglesworth, a female friend who was present, asked the deceased several questions to which he did not attend till he heard her ask

(*a*) There were several erasures and interlineations in these instructions: the words “five hundred” in both instances were interlined.

“Do you know that gentleman?”—The deceased then distinctly answered, “Yes,” as he had also in like manner (the witness adds) answered very distinctly all the former questions that had been put to him.

If the case rested here, and there was no other fact, and the question lay between these instructions and an intestacy, the Court would have great difficulty in pronouncing that the disposition of the law was altered:—there is nothing beyond mere acquiescence.

But in this case other circumstances release me from that difficulty; and raise strong presumptions, and high probabilities, of a testamentary intention and capacity.

The deceased, when a widower, and aged about fifty-five, married Mrs. Osborn who was about thirty or thirty-one years of age;—afterwards he executed a will by which he cut off his wife with a shilling:—this was evidently a will of resentment, and made under an impression of unfounded jealousy;—this will was deposited with Mr. Charles Musto who lived in the county of Essex.—In 1804 the deceased went to reside at Henley-on-Thames, where he lived till his death on most affectionate terms with his wife; this is proved not merely by casual observers; but by those who were extremely intimate with them, and who have established, to my satisfaction, that they were “a particularly happy couple.”

These are strong presumptions that he did not intend to abide by the will he had made thirteen years ago;—his declarations are to the same effect:—he builds a summer-house at considerable expense; declares it is for her, and hopes she would long live to enjoy it.—During an illness he had a year before his death he said, “I want Nancy to write to my friends in Essex, that I may alter my affairs, and leave them more comfortable for her.” “Nancy, you will go with me to town in October; and then we will alter that will of mine.” His wife was unable to attend him at that time, and the visit was postponed till the following spring.—In October he went as usual to London to receive his dividends, and then returned to Henley, bringing his wife presents from London.

These circumstances satisfy me that he fully intended to make a new will, and provide for his wife;—this is a foundation and groundwork for instructions; it is more favourable than an insulated transaction; there are also some favourable circumstances respecting the deceased’s capacity. He had been ill only a few days:—he was not exhausted by a long and painful disorder;—at the time of giving the instructions he sat up on the side of his bed wrapped up in a flannel gown with his feet on bottles of hot water (as the witness understood) apparently very ill, but not so ill as to induce the person who took the instructions to think him in immediate danger;—he used few words, but the effect of this is taken off by the consideration of his being one of a religious persuasion (a Quaker) the members of which use few words; and from the nature of his disorder, which was a cough accompanied by depression and lowness of spirits, it is not extraordinary that he should use as few words as possible;—it does not appear that his wife was at all importunate; and it is something to the advantage of that proposition that the suggestion did not originate with her, but with Mrs. Wigglesworth.

The persons who were present are very respectable persons;—there

is no appearance of a conspiracy;—the account they give presents no inconsistencies or incongruities during the transaction:—when he was told that some lady had come to see him, he said, “it is very kind in her;”—he hears, understands, and gives rational answers, before the commencement of the transaction;—he seems to know Mr. Chapman immediately on his entrance:—after the instructions were taken, and while Mr. Chapman was reducing them into writing, Mrs. Wigglesworth, in order to satisfy herself as to his understanding, asked him if he knew Mr. Chapman. “Yes sure, child,” was his reply.

Exercising therefore all caution and vigilance in examining a transaction of this kind, I am bound to pronounce for the paper.

As to the 500*l.* additional to the 1000*l.* to the children of Thomas Sutcliffe and of Hannah Musto, it was taken down in the presence of the deceased by the directions of the widow though without any immediate reference to the deceased:—it is adverse to her interest alone;—she, by propounding the paper, has assented to it; and, therefore, it must be taken as part of it.

This is a very fit case for the expenses to be paid out of the estate: indeed, it was quite necessary that the case should be brought before the Court.

LEWIS v. LEWIS.—p. 109.

Instructions for a codicil, given to a third person, who was to transmit them to a solicitor, admitted to probate.

JUDGMENT.

SIR JOHN NICHOLL.

This is a case of some novelty, and perhaps of some nicety; and there is every reason why the Court should decline to decide it on the admission of the allegation.

The allegation pleads,—

First, That Elizabeth Williams died on the 16th of May last, having made her will, dated on the 14th of April, 1818; in which she constituted her nephew Griffith George Lewis, Esq. and William Stace, Esq. executors.

Secondly, That Griffith Williams, the father of Elizabeth Williams, the testatrix, by his will, dated Feb. 2, 1790, amongst other legacies, bequeathed certain monies in the public funds to his three daughters, one of whom was the deceased in this cause, in the following words:—
“And as to my said money in any of the public funds, I give and bequeath the same to my friend Stephen Remnant, jun., Esq. his executors, administrators, and assigns, upon trust to pay the interest and dividends thereof to and among my said three daughters, Elizabeth Williams, Ann Williams, and Jane Lewis, during their lives, for their sole and separate use, and independent of any present or future husband; and in case of the death of any of my said daughters, then in trust for the said Stephen Remnant, his executors, administrators, and assigns, to pay and transfer the third part or share of such daughter so dying, to such person or persons as she shall by will give and bequeath the same: but it is my will and desire that my said daughters, or either

of them, should not be at liberty to dispose of their share of the principal of such money during their lives."

Thirdly, That Anne Williams, one of the sisters, died in February last, having made her will, by which she bequeathed the whole of her property to Elizabeth Williams, but made no specified disposition of her share of the money in the public funds to which she was entitled by the will of Griffith Williams; and that the said Elizabeth Williams gave instructions to her solicitor, William Preston Morgan, to prepare her will for her, and that he accordingly did so; and when she gave such instructions, she expressed herself as desirous of bequeathing her share of the money in the public funds, to which she was entitled by the will of Griffith Williams, as well as the share of her deceased sister, among her three nieces, Elizabeth Anne Tortoiseshell Lewis, Jane Pitcarn Jones, and Anne Georgiana Martha Lewis; and she accordingly mentioned to William Preston Morgan that those two shares of herself and his sister comprised all the money she was possessed of or entitled to in the public funds. That William Preston Morgan thereupon requested to see the will of her father: but she declined showing the same, and said it was unnecessary, as she had the complete disposal of the property."

Fourthly, "That immediately after Elizabeth Williams had executed her will on the 14th of April, 1818, it was by her desire sealed up in an envelope by William Preston Morgan, who delivered the same to her; and that some time afterwards doubts having been expressed whether the share of Anne Williams deceased in the said stock would pass by her will, and the same having been communicated to Elizabeth Williams, the testatrix, she was much troubled thereat; and for some time before, and particularly during the last eight or ten days before her decease, expressed great uneasiness lest her own will might occasion any difficulty, saying, that 'she wished Mr. Morgan would call, that he might make any addition or alterations that were necessary in her said will, to prevent the possibility of any question arising upon it as to the disposition of her part or share, as well as the share bequeathed to her by her sister.' That the deceased frequently made such declaration to Griffith George Lewis, and other of her friends who were then in the house with her; and several times desired the said Griffith George Lewis to send for William Preston Morgan, but he deferred sending for him until a correspondence which had taken place between him and his solicitor, as to the effect of the bequest contained in the will of the said Anne Williams, of her share of the money in the public funds, was concluded."

These circumstances in the four first articles leave little or no room to doubt that it was the intention of the deceased to give her property in the funds to her nieces. The question then is whether, from the facts stated in the subsequent article, she has done sufficient to remove the doubts she entertained as to the sufficiency of her will;—the paper was not produced to her, nor even read over to her.

The fifth article pleads that on the 14th of May, Elizabeth Williams desired her nephew Griffith George Lewis, who was then in her bedroom, to take her will out of a drawer in the said bedroom, and "to send for William Preston Morgan, and deliver it to him, and desire him to make what addition thereto he might think necessary for the purpose of preventing any question or litigation arising respecting her

said monies in the public funds;" and that the next morning, finding the deceased very unwell, he went to the house of William Preston Morgan, and delivered him the message, and desired him to call on the deceased.

On the following day Morgan called; the deceased was asleep,—but the will was delivered to him by her nephew;—in consequence of his directions, a codicil was prepared. Morgan carried it for execution;—the deceased was in a stupor, and died on the following morning without any act of execution.

There have been many cases in which instructions received from the party deceased, but not reduced into writing in his presence, nor read over to him, have been pronounced for on clear proof of the intention:—but I believe in all these cases the instructions have been given to the drawer by the deceased;—here they were not given by the deceased, but by him to a third person, that however a credible person, and one whose interest it was to maintain an opposite opinion, for he would be entitled himself to a share of that residue which purports to be given by the paper in question to the three nieces; the evidence, therefore, will come recommended by the circumstance of its being adverse to his own interest.

If the deceased had merely told Morgan to prepare such an instrument as would carry her intentions into effect, there can be no doubt but that the case would come under several decisions of this Court.

The question then is whether there is any rule of law that instructions which pass through the medium of a third person should not be admitted to probate, though no question arises on the credit due to the witness, or of the intention of the deceased. The Court undoubtedly, in such a case, would be doubly on its guard: but I have yet to learn that it is essentially and absolutely necessary that the instructions should come from the testator to the person who is to prepare the instrument. Here the instructions are recommended also by the additional consideration that the codicil was not to alter the will, but was supplementary to it, and explanatory of it, and with the express object of removing doubts that might be technically raised as to forms. If all these circumstances can be proved, I shall *on principle* be rather at a loss to know what further demands the law can make in order to induce the Court to pronounce against the validity of this instrument.

Allegation admitted.

JUDGMENT.

SIR JOHN NICHOLL.

When the allegation in this case was admitted, the Court expressed an opinion, that if the facts should be proved, the codicil would be valid. I have since revised the arguments and my opinion, and I see no reason to alter the latter. The only question is, whether the facts are so proved as to establish the truth of the allegation. The cases adverted to are those in which doubt was entertained as to facts, but not as to principle; cases in which the Court could not safely rely on the memory of the person who was examined.

If the instructions were given by the deceased, and those instructions were reduced into writing during his lifetime, and sudden death intervened to prevent the due execution of the will, I know of no rule of

law to exclude those instructions from probate, because they were reduced into writing by a third person. I see, therefore, no ground to alter my opinion.

On the facts, there is no doubt but that the deceased intended to leave her property in the funds to her nieces. The only reason which rendered the codicil necessary was, whether the words of the will would give effect to this intention. The nature of the doubts were well known to the deceased, and clearly expressed by her: she discussed them with her solicitor, Mr. Morgan. All she had to do was to make a codicil to remove all doubts as to the construction of her will, there being none as to her intention.

The question is, whether she gave instructions for the preparation of such a codicil? The executor in this case gives evidence against his interest; for if the property should not pass by the will, he would be a party in the distribution of it;—there is every reason to receive his evidence with perfect reliance:—his examination on the fifth article shows that he had in effect received instructions and directions for preparing the codicil.—The manner in which this was to be done he alone could decide.—This is as perfect a direction as if she herself had dictated the words. This I consider as full proof of instructions;—but it does not rest here. A young lady was present who heard this, and confirms it. The Court is extremely jealous where the drawer does receive the instructions himself, lest he should mistake or contravene the meaning of them. Here there is no difficulty of that sort. Her anxiety is clear, and there is no appearance of contrivance. Mr. Lewis directs the solicitor to come there; on his arrival, the testatrix is not in a state to see him, she having fallen into a doze. The whole conduct of the party shows that the instructions were thought to have been finally given;—they were written fair at the bottom of the will itself, under circumstances in which it was proper and regular so to do. The deceased herself considered that she had given final instructions;—she was anxious that Mr. Morgan should bring the instrument for her signature, being afraid that she should be too late to sign it at all. Where an instrument is not read over to the deceased, the Court is vigilant for fear of mistake or imposition. Here there was no neglect, and there could be no imposition. The solicitor attended to have it read over, and executed: but was prevented from seeing the deceased on account of her incapacity.

It is most clearly and satisfactorily proved that the deceased gave the instructions, and that the codicil was reduced into writing during her life. It is as valid, therefore, as if it had been absolutely executed by her, and I pronounce for it.

GRANT v. LESLIE.—p. 116.

An executor according to the tenor, entitled to be joined in the probate with the surviving executor of a wife. *6 H. 32.*

JUDGMENT.

Sir JOHN NICHOLL.

Lord Newark, the deceased in this case, leaves four codicils; by the last he appoints his nephew residuary legatee. His personal property amounted to 37,000*l.*; the legacies to 1400*l.* Charles Grant and Alex-

ander Thompson, two of the executors, took probate, and possessed themselves of the property: but Alexander Thompson is since dead. Mr. Leslie claims now to be executor according to the tenor. The question is, whether he is entitled to be joined in the probate, with an executor expressly appointed.

It has been hardly denied in argument, that if it was the clear intention of the deceased to appoint an executor according to the tenor, it is within the competency of the Court to grant probate to him. The distinction attempted is not founded on solid principle. Why is any person allowed to be an executor according to the tenor? Because it is the intention of the testator that he shall take the management of his property after his death. Undoubtedly, where there is an express appointment of an executor, it is less probable that there should be an indirect appointment to the same office. Still, if the thing is clear, if a testator by codicil should say, "I direct A. B. to join in collecting my property, and paying my legacies," it can scarcely be denied that a person so distinctly appointed must be considered as an executor. The authority from Wentworth, *Wentworth's Executor*, Pa. IV. s. 4. p. 230, is clearly to this effect.

I have caused inquiry to be made at the office, and I find there is no rule of practice which should exclude a person so appointed.

In *Collard v. Smith*, Prerog. 1799, I see from my note that the Court said, "this will is so worded that it is hardly possible to understand it. Three persons are named in trust; the question is whether the son is to join with them; the best way is to join him with the other three;" and I take it in this case the Court granted probate to an executor not named, together with three that were named.

In *Powell v. Stratford*, Prerog. 1803, the wife was expressly named as executrix. Lord Henniker was to assist her: but he was not called an executor; the Court said he might be so according to the tenor.

Hence, I think, that if the deceased intended to join this person in the management, the Court is to join him in the probate.

The second point is, whether Mr. Leslie is an executor in the terms of this codicil according to the tenor.

The codicil is dated on the 25th of March, 1818. Mr. Leslie was then on the point of attaining twenty-one years of age. The words are, "I appoint my nephew Shirley Conyers Leslie my residuary legatee to discharge all lawful demands against my will and codicils signed of different dates."

It is a separate codicil;—no other person is the object of it. It is alleged in the act of Court that this is a re-appointment of a residuary legatee: but it is not so. He was appointed residuary legatee when a minor by the will. The words "residuary legatee" are only descriptive. The remaining words express the real object of the codicil, "I appoint my nephew to discharge all lawful demands." To discharge lawful demands is the very office of an executor, more especially to pay debts.

Supposing it doubtful, what were the intentions of the deceased;—where the expressions apply to the residuary legatee, the Court must willingly admit him, because he has the greatest interest in the proper management of the estate. Assuming the meaning to be doubtful, I cannot accede to the argument that the Court is not to take into its consideration the convenience and advantage which will be derived to the

estate. I have heard no inconvenience stated in case he should be joined to Mr. Grant. I must presume Mr. Grant will do what he says he will do; namely, proceed against the representatives of the other executor, who has died. Suppose he should alter his mind, then there would be great disadvantage to the residuary legatee: but if the residuary legatee is joined with him, then *he* can take care to proceed against Mr. Thompson's estate. There is no inconvenience one way, there is the other way. I shall do what my predecessor did in a similar case. I feel myself authorised to grant a joint probate. I think it was the intention of the deceased that Mr. Leslie should be joined in the executorship: but if this be doubtful, I think there is good reason for granting a joint probate; and I shall grant it.

On the question of costs.

Per Curiam.

I think that the expenses of both sides must be paid out of the estate.

ARCHES COURT OF CANTERBURY.

AUSTEN v. DUGGER.—p. 120.

Brawling proved.

PREROGATIVE COURT OF CANTERBURY.

LOXLEY v. JACKSON.—p. 126.

When a will is not found on the death of a testator, the presumption of law is, that it has been destroyed by him.

JUDGMENT.

Sir JOHN NICHOLL.

The deceased made a will in 1809, and left every thing to Mr. Jackson except two small legacies;—he was the sole executor; the will was deposited in his hands where it remained till after the death of the testator.—Another will is stated to have been made on the 28th of December, 1816, giving considerable part of the property to Mr. Loxley's family, who were next of kin. Mr. Jackson is residuary legatee and one of the executors. This latter will was in the custody of the deceased, but is not produced;—a draft of it is propounded.

The question is whether it is proved by Loxley that the will was not destroyed by the testatrix or that it has been destroyed since her death. The presumption of law is, that she herself destroyed it *animo revocandi*;—the law does not presume fraud;—the burthen of proof is on Mr. Loxley; he has charged Mr. Jackson with the spoliation of the will:—and the question is, whether it has been destroyed or suppressed without the privity of the testatrix.

Sarah Thompson is the deceased;—the parties are her nephews and nieces;—the property amounted to 4000*l.*;—the husband was an engraver;—she took into partnership Mr. Jackson, who had been first an ap-

prentice, and afterwards foreman. In 1808 Jackson married the daughter of her first husband;—in June, 1809, the first will was made;—there was no mention of this daughter in the first will; but it contained expressions of the greatest regard and fullest confidence in Mr. Jackson. Mrs. Thompson retires from business; and in 1813, Mrs. Jackson dies without issue;—no alteration in consequence of that event is made in the will of 1809; it remains in full force till 1816. In 1816 the deceased entertained a suspicion that Mr. Jackson had formed an illicit connection with a maid servant; in consequence of this he was lowered in her regard; but she does not, therefore, give him up;—she selects him to accompany her to Harrogate in the autumn;—it is suggested that about this time the deceased wrote a testamentary paper; but this is founded on such loose circumstances that it appears to be mere conjecture. She does however, secretly and without the privity of Jackson, procure Watts to make a new will for her towards the end of the year;—she signs the draft of it in November, and on the 8th of December executes the will:—these facts are clearly ascertained;—it is unnecessary to advert to the depositions;—the instrument was left in the possession of the deceased, and deposited in a blue box:—the box was deposited in the closet of her room, and remained in that closet till after her death.

The questions are, whether the deceased is proved negatively to have been unable to destroy the will herself, or whether Jackson had access to it during her lifetime, or had possession of it after her death. The principal witness is Elizabeth WASHINGTON, who has released her legacy under the will;—she has been examined by both sides;—her impression is that it was in the blue box at the deceased's death. It is necessary to examine the grounds of this opinion:—she went to live with the deceased on the 3d of January, 1815, and continued her servant till her death; she states on her examination, “that on the evening after Mr. Watts had left the deceased, she told the deponent that she had been making her will; and that to prevent mistakes, and that the deponent might not have any trouble in getting it, she had left her 30*l.*; and she said she was sure that Mr. Jackson would see her righted; and that at the time she told her of the 30*l.* she enjoined the deponent, the moment the breath was out of her body, to take the will to Mr. Watts, and deliver it to him; that on the same evening, seeing the will lying upon the top of a low chest of drawers wrapped up, and fastened in a cover with three seals, she asked her mistress if it should not be put away, who then desired the deponent to put it into a drawer of the chest of drawers; that after it had remained there about a week she asked her mistress if it had not better be put in some more secure place; and she desired her to bring a small box covered with blue leather in which she always kept some papers; that the box stood on a shelf in the cupboard in the deceased's bed-chamber, in which at that time she chiefly staid; that after she had fetched the box the deceased desired her to get the key (which was in a little drawer) and open it, which she did, and put the will into it, locked it again, and put the key into the little drawer; and then, by her mistress's desire, put the box again into its place in the cupboard;—that whilst the deceased kept in her bed room such cupboard was seldom locked; but when she did not keep her bed-room it was generally locked, and either the deceased or the deponent then had the key;—when she replaced the box, she put on the top of it five small pictures, wrapped up in a newspaper, and a pair of silver branches that belonged to some

candlesticks also rested on it; and the said blue box never, to her knowledge, was afterwards moved after so replaced by her as before deposited, during the deceased's lifetime; and after her death the deponent saw the newspaper parcel with the five pictures, and the silver branches, resting and lying on the said box apparently in the precise position in which she had before placed them. Wherefore she does verily believe that the said will was therein at the time the deceased died; for if the deceased had taken it out, she thinks she must have known it, as no person but her mistress and herself ever went to that cupboard. That in the course of the last week of the deceased's life she asked her if she should write to any of the family of Mr. Loxley; and the deceased said, "No;"—that on the day after the deceased's death, Mr. Jackson asked the deponent for the key of the cupboard, in the deceased's bedchamber, wherein the blue box was, and the deponent unlocked the cupboard in his presence, Mr. Jackson removed the pictures and silver branches, and then took out the blue box in which the deponent believes the will of the deceased, made by Mr. Watts, then was;—she then told him that the will was in the box, and that the deceased had directed her to take it to Mr. Watts the moment the breath was out of her body; and that she was desirous of performing her mistress's request, and told Mr. Jackson so, who said, 'What have I to do with Mr. Watts? I shall employ the person who used to do business for your mistress;' and Mr. Jackson delivered the blue box together with a tin box, a red trunk, and a writing desk belonging to the deceased, to a Mr. Downe, who took them all away with him in a hackney coach."

In answer to an interrogatory this witness says, "The deceased could no doubt have had access to the box in which the will of December was deposited, but had not to the respondent's knowledge;—that the blue box was locked when removed by Mr. Downe; that the key was in the drawer of the deceased's dressing table at the time."

Thus stand the facts on this evidence.

The first point is the inability of the deceased to destroy the will. Washingham has a strong impression that the will remained in the blue box: but she does not suggest that the deceased, after the 28th of December, made any reference to it as a will in existence;—the injunction to carry it to Watts is not renewed:—there is no recognition either directly or indirectly of its being in existence. On the other hand the deceased lived for nearly three months with the will in the closet to which she had access without the knowledge of any person:—is there any probability that she should have secretly destroyed the will? If she wished to destroy it, she would naturally replace the things in the state they were before. As to her bodily incapacity, when I find that, within a fortnight of her death, she is able to go from Kennington to the Bank, and other places, it would require more satisfactory evidence than Washingham's to convince me of it. Add to this:—Mr. Spencer's evidence renders it not improbable that she should have destroyed the will. He says, "that the deceased frequently expressed great uneasiness to him at the conduct of Walter Jackson who had formed an illicit intercourse with his female servant, and expressed her fears lest he should marry her: but that in January, 1817, Walter Jackson requested the deponent, as a friend, to go to Burnham and discharge his servant Mary, the person of whom the deceased had complained, but did not explain his motives for so doing. The deponent discharged

the servant; and a short time afterwards, that is, the end of January or beginning of February, 1817, being with the deceased who was then ill, she was regretting to him not being able to go to see her son (as she always called Walter Jackson) and on the deponent's asking her why, she said on account of that woman who is there of whom I have often spoken to you. I cannot go whilst she is there. The deponent told her that all her objections on that head were removed; for that she, meaning the aforesaid Mary, had left the house long before; and the deceased expressed the greatest pleasure and satisfaction at that event, and told the deponent he had made her quite happy by the communication.

Other witnesses, not less than seven, speak to the communication made by Spencer of the removal of the female servant. Some place it earlier than this will;—three of them differ as to time;—where they differ as to time the Court cannot rely on their fixing it, as they assign no particular reason for fixing it at any time. It is said this period is so important that Jackson should have been able to fix it with certainty;—but he had no reason to expect contrariety of evidence, and Loxley did not counterplead the fact;—but taking the fact the other way that the communication was previous to the will, still being satisfied that Jackson had discharged the woman, it is not inconsistent with the ordinary movements of the human mind that she might have reverted to her original regard for him.

Spencer had several interviews with the deceased in March: he speaks to the warmth of her feeling, and to the relief of her mind at learning that Jackson had broken off the connection with the servant. She told him “she could not rest in her bed, or be easy in her bed, till she had done something. He believes these were her very words: she did not say she had destroyed a will, or some other act prejudicial to Walter Jackson: but she said that things were now as they had been before, and that she was perfectly happy.”

These declarations, and her saying that things were as they had been before, coupled with her unwillingness to say any thing of the will, and her attachment to Jackson, make the Court think that Spencer is correct in supposing that she continued her confidence to Jackson. He is the only person she wishes to be sent for during her last illness;—the probability of the fact is strong that the presumption of law draws the right conclusion.

The burthen of proof is on the other party:—is there any evidence that Jackson destroyed the will in the deceased's life time? It is not suggested that he had any access to it at that period, or any knowledge even of its existence. If the case rested here, and immediately after her death her repositories had been opened, I should have had no difficulty in deciding it.

There is, however, the important fact that Jackson having been told the will was in the blue box, thought proper to remove it;—his conduct in this respect was imprudent and unguarded, to say the least of it. It is my duty for the interests of justice, and the security of testamentary instruments, to hold that when persons undertake to do this, they subject themselves to strong presumptions against their conduct: but fortunately Mr. Jackson has been able to prove the charge of spoilation unfounded;—the blue box was placed in Mr. Downe's hands; the key was in the hands of Washingham.

Mr. Downe has been examined;—he delivered the box to his wife to be locked up. Mrs. Downe proves the receipt of it;—she went to market, and returned home, and found the solicitor and Mr. Jackson. The solicitor proves it was unlocked in his presence. This forms a complete chain of evidence directly proving that, notwithstanding Washington's impression, the box did not contain the will. From these circumstances added to the consideration that she did not mean to die intestate,—I am satisfied the box did not contain the will at the time of the deceased's death.

The presumption is, that she destroyed it with the intention of reviving her former will; and I direct the probate of that will to be again given out of the registry.

FRISWELL v. MOORE.—p. 135.

A will without date or signature established.

Residuary legatees for life taking administration with the will annexed called upon to give some security.

JUDGMENT.

Sir JOHN NICHOLL.

Thomas Matthew Field the deceased died in May, 1818; the paper propounded is entirely in his handwriting.

“Be it known to those whom it may concern that I, Thomas Matthew Field, now living at No. 93 Wimpole Street, near Oxford Chapel, being of sound mind, and revoking all former wills, being induced by prudential motives and the consideration of the uncertainty of human life to make such a distribution of whatever worldly property that may appertain to me at the time of my decease, as to prevent any litigation concerning the same. With this intent I have annexed a catalogue of my furniture, cloathing and household requisites, which, with my leasehold premises, and property in the public funds, will comprehend nearly the whole of my worldly possessions; and which it is my desire to dispose of in the following manner.

Imprimis.—I have appointed Mrs. Mary Moore, and Mrs. Dodwell, now living at 40, Doughty-street, Gray's Inn Lane, to be my executors, to receive and dispose of, in manner hereinafter mentioned, all such rents, interests, and monies, as are now or may hereafter become due to me. And to give them as little trouble as possible in the performance of this friendly office, I have intrusted Mrs. Friswell, with whom I now lodge (who is fully acquainted with the subject) to collect all such rents and interests and pay all such demands thereon as are or may become due thereon, rendering a true account of the same to my before named executors, and paying to them the net produce to be by them or her placed in the public funds, called the Old Navy five per cents, with the stock already there in my name. The interest of this increasing stock Mrs. Friswell may be enabled to receive by my executors granting to her a power of attorney so to do; and allow her twopence in the pound for her trouble in collecting. This process I desire may be continued for seven years after my death, or so long as Mrs. Friswell shall continue to discharge this office satisfactorily and faithfully to my executors; after which time I desire the

net produce of all my rents and interests may be equally shared as they become due among my four nephews and nieces (that is to say) William Henry Moore, Thomas Matthews Moore, Elizabeth Moore, and Ann Moore, children of my late sister Martha Moore, or the survivors or survivor of them during their lives; and after their decease the remainder, both principal and interest, to be divided among such of their legitimate children as may respectively attain the age of twenty-one years.

“*Item.*—To Mary Frith, commonly called my niece, and formerly my servant, the sum of 30*l.* a year during her life, and independent of any husband she may contract, and 10*l.* in money.

“*Item.*—To my executors, I leave the sum of 100*l.* each in the 3 per cent. consols.

“*Item.*—To Mrs. Brown 10*l.*

“*Item.*—To Mrs. Davidson 10*l.*

“*Item.*—To Mrs. Holcroft 10*l.*

“In case of the expiration of leases or other casualties, I desire my executors may act therein as they may think best for the benefit of my legatee, consulting with them (should they or any of them be in England) on the means to be taken.

“*Item.*—My household furniture, beds, bedding, wearing apparel, utensils requisite, writing desk, and implements, I leave to my servant Sarah Pardoe.

“*Item.*—My books of account, leases, papers, and documents, it may be necessary my executors should have temporary possession of. These of every kind relative to my property or business, my printed books, plate, gold watch, I leave to my executors in trust for Thomas M. Moore.

“My veterinary stock I desire may be disposed of for the benefit of such of my nephews and nieces as may be then living. In case of any lapsed legacy occurring, I desire it may be added to the general stock intended for my nephews and nieces.”

It is written fairly—there is nothing to show that he intended to do any further act;—at the end of the whole there is an inventory setting forth the state of his property; but it has neither date nor signature.

The paper is propounded by Mrs. Friswell who is to do all acts for seven years;—the two executors have renounced probate probably for the purpose of being examined as witnesses in the cause.—The deceased had been formerly a surgeon: he is described as of peculiar and singular habits which account for the *shape* of the will;—his wife died before him, and he lived afterwards with a family of the name of Friswell, in Wimpole Street;—he died suddenly at a small in:—All these circumstances are stated in plea, and proved by seven witnesses. From the evidence I am satisfied that it was the deceased’s intention that the will should operate in its present form.

The question now is, who is to have the administration with the will annexed. Mrs. Friswell is to act as substitute;—if there is no executor, it is said Mrs. Friswell is executor according to the tenor;—but her claim is resisted by the intervention of one of the nephews who has been resident in New South Wales;—if this person is come over with competent authority from three other residuary legatees, I do not see how I can refuse the administration to him.

I pronounce for the will; and decree administration with the will annexed to Thomas Moore, and direct the sureties to justify.

Application was made to the Court to rescind that part of the decree of the 2d March last, which called upon the sureties to justify.

Phillimore for the application.

Adams contra.

Per Curiam.

I should recommend the parties to arrange this point between themselves; and, with that view, direct the cause to stand over till next Court.

It was stated on behalf of the residuary legatees for life that they were willing to give security in 5,000*l.* which was four times the amount in value of the legacies bequeathed to them.

Per Curiam.

The Court will be satisfied with this;—the only object is the protection of property belonging ultimately to minors. There is no suspicion against the party.

ROCKELL v. YOUNG.—p. 141.

A bequest of residue omitted through the error or inadvertence of the solicitor to be inserted in a testamentary instrument, not admitted to probate.

JOHN HINKSMAN died, at Erbistock, in the county of Flint, on the 6th of April, 1818, leaving personal property to the amount of 3,800*l.* By his will which was formally executed on the 21st of July, 1806, he distributed his property amongst several of his relations and friends, and appointed Ann Rockell, his sister, and Thomas Watkin Young, executors.

An allegation was given in on the part of Ann Rockell, which, after stating a variety of circumstances which had induced a change in the testamentary intentions of the deceased with respect to Thomas Young, who, besides being an executor, was a considerable legatee under the will, proceeded to plead, “That the deceased became indisposed in January, 1818; but that till the afternoon of the day previous to his decease the indisposition was never considered by himself or any of his friends or attendants as immediately dangerous;—that from the time, or very shortly after, he had been attacked by illness he expressed an earnest wish that Mr. Pugh, an intimate friend of his, who resided at Erbistock, but who was then absent at Chester, would return home, as he wished him to draw up a will for him;—but the said Mr. Pugh having broken his leg did not return home during the deceased’s lifetime.”

“That having a desire to provide more amply for his sister, Ann Rockell, and finding his health fast declining, and that Mr. Pugh did not return, he on the 4th of April last sent to Richard Miller Benjamin, a solicitor, residing at Wrexham, about eight miles distant from Erbistock, to desire him to attend immediately in order to receive instructions for his will;—that Richard Miller Benjamin accordingly waited on the deceased on the evening of the 4th of April, and found him in bed, apparently in a very weak state of health, but of perfectly sound mind, memory, and understanding;—that the deceased proceeded to give the said Richard

Miller Benjamin instructions for his will;—and one of the first observations the deceased made on giving such instructions, which he several times repeated, was, that it was his intention to leave all his property to his sister, Ann Rockell, except a few legacies, which he then mentioned, and which were committed to writing by the said Richard Miller Benjamin in the deceased's presence;—*but he the said Richard Miller Benjamin having from the deceased's particularity respecting his said sister a perfect recollection of the instructions relating to her, omitted to put in writing any disposition of the residue of his personal estate directed to be made for the benefit of his aforesaid sister;*—that the instructions, so as aforesaid in part committed to writing, were not signed or otherwise executed by the deceased; nor were they read over either to or by him, whereby he was unable to know that the disposition of the residue in favour of his sister was omitted; and the deceased verily believed that Richard Miller Benjamin had inserted in the instructions such intended disposition of the residue." And it was further alleged "that the deceased having *given full, complete, and final instructions*, to Richard Miller Benjamin for the disposal of his personal estate and effects desired him to prepare a will therefrom, and to have the same immediately engrossed fair for execution, and said he would send for him to attend the execution thereof on the following day, *viz.* the 5th of April; and the deceased, being apprehensive of death, and very anxious to execute his will, again sent to Richard Miller Benjamin, desiring to see him: that not having drawn up the will as desired by the deceased, *Richard Miller Benjamin taking with him the instructions, repaired very early on the following morning to the deceased's house; and then found that the deceased had departed this life some few hours previous to his arrival.*"

The allegation then exhibited the *instructions*, and alleged and propounded the same to be and contain the true and original instructions for the last will and testament of the deceased which were committed to writing in his presence, and at his desire, and propounded the same *together with the bequest of the residue of the personal estate and effects of the deceased* directed by the deceased to be given and bequeathed to his sister, Ann Rockell, *but, through error or inadvertence, omitted to be therein inserted*, as containing together the true and original last will and testament of the deceased."

Jenner and Phillimore against the admission of the allegation.

Adams and Lushington in support of it.

JUDGMENT.

SIR JOHN NICHOLL.

This is an allegation setting up a case of a very novel sort, and must have been brought before the Court rather to satisfy the wishes of the party than from any hope the counsel could have entertained that it could be attended with success:—to admit it, would be to establish a precedent contrary to all the rules which have governed this Court subsequent to the passing of the Statute of Frauds.

The deceased died on the 6th of April of last year,—the will was made in 1806. The residue is left to a sister for life, and afterwards to her children. The sister and Mr. Young are appointed executors;—the will remained in the possession of the deceased, and is found uncanceled. Between 1806 and his death a new will was begun;—this unfinished will is very much like the former will;—whether he would

have gone on to appoint the same executors, and make it in other respects the same, the Court cannot decide:—it breaks off in the middle. Two days before his death he sent for his solicitor, and gave him instructions in the manner stated; but these are merely heads of legacies which amount to 350%.;—there is no bequest of the residue;—no appointment of executors;—it is the mere inception of a disposition;—an attempt is made to propound this paper with a bequest omitted to be reduced into writing;—there is no case that I am aware of in which a bequest has been established that has not been reduced into writing in the lifetime of the testator. The Court has gone the greatest possible length when it has pronounced for instructions which have been reduced into writing during the lifetime of the deceased;—but which have not been read over to him. The Court has always stopped short where the instrument has not been reduced into writing till after the death; and I cannot agree in the construction attempted to be put on the Statute of Frauds that this would be a will by word of mouth.

The Court is always anxious to carry into effect the intentions of a party; but it must be when those intentions are shown in a legal form; it cannot act upon conjectures of its own.

Whether this is pleaded in the usual form is immaterial further than to show that it could not, from the nature of the attempt, be stated in the usual form.—In supply of proof they exhibit B., and then propound that paper together with the bequest of the residue “*through error and inadvertence omitted to be inserted.*” This is a perfect novelty;—it would be difficult since the Statute of Frauds to find any pleading of this description.

It is a common rule that a paper in part proceeded upon cannot revoke a former will; it can only revoke it *pro tanto* even as to personal estate;—this paper is not, however, brought before the Court in that way; and, therefore, I am not called upon so to deal with it.—All that is stated as to the dissatisfaction of the deceased with Mr. Youde would be corroborative of his intention to make a new will;—if a new will had been made, the allegation might in this respect have been admissible; but these circumstances are not sufficient of themselves to have the effect of a revocation.

What is the proposition? To pronounce for B. with a disposition of the residue not reduced into writing during the lifetime of the deceased. I purposely forbear going into the detail of the circumstances which have been commented upon by the counsel in support of this allegation, because I am unwilling to shake the effect of the rule.

I hold it wise in the law not to open a door to the admission of parol evidence to this extent. Courts have gone the utmost length to which it would be prudent to go;—they only go even that length with great caution, when they admit to proof papers reduced into writing during the lifetime of a testator. For the sake of the public, and to protect the interest they have in the disposal of personal property, it is quite right that the Court should firmly adhere to this rule; and, therefore, I reject this allegation.

ARCHES COURT OF CANTERBURY.

NORTON v. SETON, falsely calling herself NORTON.—p. 147

By letters of request from the Consistory Court of Peterborough.

A man not allowed to plead his own natural impotency as a ground for a sentence of nullity of marriage.

This was a suit of nullity of marriage instituted by George Norton by reason of his own natural impotency and defect in his organs of generation.—The marriage had been solemnized by licence on the 18th of June, 1812, he being then forty-five and the woman twenty-three years of age.—They had cohabited till June of the present year.

Adams and *Dodson* in objection to the libel, referred to X. 2. 27. 2. 29.—*Brower* 2. 4. 14. 16. 2. 4. 22. *Sanchez* 7. 97. 9. 10. 12. 7. 98.

Phillimore and *Lushington* in support of the libel, referred to X. 4. 15. 1. X. 2. 19. 4. and a manuscript opinion of the late Sir William Wynne, (a).

Per Curiam.

I shall examine the authorities before I give my judgment to see what was the doctrine of the Canon Law, and how far it has been adopted here; and, in the mean time, I wish search to be made whether there has been any precedent for such a suit. If the defect is such as has been pleaded it seems as if the marriage must have been contracted scienter; then, after so long a cohabitation, the party comes to annul his own contract. I wish precedents to be produced, if there be any.

Phillimore stated the difficulties that had attended the search from the want of Reported Cases, and the inaccurate manner in which the Arches books had been kept. The search had been made with a two-fold purpose: first, to ascertain the greatest number of years that had elapsed between a marriage and the institution of a suit of this description;—and, 2ndly, Whether any instance could be adduced of a person instituting a suit on the allegation of his or her own impotency.

The cases found were the following:

The Honourable Catharine Elizabeth Weld, *alias* Aston, against Edward Weld, of Lulworth Castle, in Dorsetshire, a cause of nullity of marriage, by reason of impotence, in the Arches *primâ instantiâ* by Letters of Request from the Chancellor of Bristol. The parties were married in 1727, the suit was brought in 1730.

The Duchess v. The Duke of Beaufort. Arches 1742. The suit

(a) I think a woman may institute a suit of nullity of marriage against her husband on account of impotency or incapacity *in herself* to perform the duties of marriage; and I think that if the persons appointed by the Court to inspect her (which is the method of proof upon which these cases always proceed) should certify that she appeared to them, from a defect in the natural formation of her body, to be absolutely incapable of being carnally known by a man; upon this proof the marriage must be pronounced null and void. WILLIAM WYNNE.

Doctors' Commons,

May 5, 1777.

was originally brought in the Consistory Court of London, where the judge ordered the fourth article of the libel to be reformed;—it was appealed to the Arches, where the libel was admitted in its original form. The cause was finally heard in the Arches, May, 1743, on the Duke's answers, and the inspection of physicians, and decided in favour of the Duke;—the Duke was twenty-one years old at the marriage, the Duchess seventeen;—the marriage took place in 1729.

Leeds, otherwise Lamborn, v. Leeds. Parties married in 1753: the suit was brought by the wife, in the Consistory Court of London, in May, 1758. The libel was admitted; and the report of the physicians and surgeons was made on the 25th of May, 1759. The proctor for Mrs. Leeds objected to that report as not being sufficiently full and clear, and prayed a further report. The judge rejected the petition, and concluded the cause;—it was appealed to the Arches, where the appeal was pronounced for. The judge ordered a more full report:—a further report was accordingly made; but that also was objected to on the behalf of Mrs. Leeds. The cause was appealed to the Delegates. The Delegates pronounced against the appeal, but retained the cause; and it does not appear that any further proceedings were had in it.

Forster, otherwise Schutz, v. Schutz, Consistory of London, 1770. The marriage took place in March, 1770. The suit was brought by the wife in November of the same year. The libel was admitted, some irrelevant articles being rejected. A report of physicians and surgeons was made. Objection was taken to that report. The judge pronounced it to be full. The cause was appealed to the Arches: but the appeal not being prosecuted, it was remitted to the Consistory, where Mrs. Schutz was held to have failed in proof of her libel.

Grimbaldeston, otherwise Anderson, v. Anderson. Arches 1778. The marriage was in 1775, the suit was brought in 1777, in the Consistory Court by the wife. The libel was rejected. The judge, Dr. Bettesworth, laying great stress on the time of bringing the suit, there not having been three months' cohabitation,—it was appealed to the Arches; and it appears that in the argument, the counsel (Dr. Wynne) pressed upon the Court the caution which ought to be observed in admitting pleas of this description. The note of the sentence of the judge (Dr. Calvert) is to this effect:—"Court. Impotency a good ground of nullity. Not much weight in argument as to unfavourable suit. Whether the case is such as the Court can redress. The virginity of woman very material. Libel properly drawn: but in this case the opinions of inspectors only must determine; and not sufficient for the Court, as in the words of the libel they could only say it appeared soft and short which does not always continue. Therefore, three years's cohabitation necessary.

Grimbaldeston, otherwise Anderson, v. Anderson, Consistory 1777. Arches 1778.

Libel rejected for want of three years' residence, only about three months cohabitation.

Schultz v. Schultz. Leeds v. Leeds. Larkin v. Frost."

Harris, otherwise Ball, v. Ball. The parties were married in 1781;—the husband was thirty-four, the wife seventeen years old. The suit was brought by the wife in the Arches, 1788. The libel was rejected, but upon an appeal this sentence was reversed, and the libel was admit-

ted by the Delegates to proof; the wife, however, ultimately failed in the suit.

Dick v. Dick, Arches. May 24, 1811.

Greenstreet, falsely called Comyns, v. Comyns. The marriage was in 1807, the suit in 1812. Sir W. Scott in giving judgment in that case, said—"there is great disposition on the part of the husband to atone for the injury he has inflicted on this lady, being in utter ignorance of his constitutional defects." The libel in that case was drawn precisely in the same form as this;—and why in that case was the man to be presumed to be ignorant of his natural defect, and not so in this?

In the text of the Canon Law, X. lib. 4. tit. c. 9, ante, p. 165. a case is stated in which a woman applied for a divorce on account of the frigidity of her husband after eight years' cohabitation, and obtained it.

The Court took further time to deliberate.

JUDGMENT.

Sir JOHN NICHOLL.

This suit is brought by George Norton against Sarah, his wife, to declare his marriage void;—the libel pleads that the marriage took place in June, 1812; that the husband was a bachelor, aged forty-five years, and the wife, a spinster, aged twenty-three;—that they cohabited till June, 1819; that they were both in health, but that the husband was incapable, from bodily defect, to consummate the marriage;—that his defect was incurable by art, as would appear upon inspection by medical persons.—The admission of the libel is opposed by the wife, who prays to be dismissed.

The question is, whether the Court can entertain this suit;—whether the husband is entitled to his remedy;—whether he states facts capable of proof;—or, whether, if the facts should be proved, the marriage ought to be set aside.

The first objection is, that the suit is of a novel kind. After the best and most diligent search no instance has been found of a party bringing a suit to set aside a marriage on account of his own incapacity;—the party complaining has always been the injured party, and generally the suit has been brought by the wife;—there has been but one suit in my recollection brought by the husband, *Wilson v. Wilson*, Arches, 1795.

The next circumstance is the age of the man. It is incredible that he should have lived forty-five years, and be ignorant of his own bodily defect, which he alleges to be apparent upon inspection. I do not see how his ignorance could be proved; it is incapable of direct evidence. The presumption is in favour of the marriage;—besides there was a subsequent cohabitation of seven years before the suit was brought;—at all events he must have discovered it some time before he applied for his remedy. The maxim then applies, *cur tamdiu tacuit?*—The lapse of time may act as an absolute bar to the suit not brought by the party injured. In *Ball v. Ball*, Deleg. 1790, it was so held by the Delegates; the modesty of the sex may account for forbearance on the part of the woman;—he has not only defrauded his wife into a marriage whereby he acquires a right to her property, but has kept her during a long cohabitation subject to continual injury, and now is seeking to throw off the burthen of maintaining her:—this increases the weight of presumption against him. Another circumstance not to be passed over is, that the marriage is by licence;—it is so usual for the man to be the person

to obtain the licence that it is to be presumed in this case he did so by his own affidavit; and he swore he knew of no impediment to the marriage;—ignorance of the fact is not only not to be presumed, but is almost incredible. Another objection is, that we cannot obtain collateral proof either by the answers of the wife, or by the inspection of her person;—it has been stated by the husband's counsel that the wife is pregnant; he cannot, therefore, call upon her to confess that her marriage was not consummated, for she must then furnish evidence to criminate herself. Nor can she allege that she is *virgo intacta*, a species of proof sometimes resorted to.

So that in point of proof the case must rest upon the inspection of the husband by medical men. And can any case be found where sentence has been given on the sole report of the inspectors?—This species of proof, even as collateral, is always received with caution. I am not aware that it has ever been held sufficient alone; and if not in any former case,—is it to be first taken in this case, where the wife is said to be pregnant? The Court is called upon not merely to pronounce against the marriage, but to bastardize the issue. Is there any case in which bastardy has been established on the frigidity of the husband; or by any proof, but that of non-access.—There has been a cohabitation of seven years; frequent endeavours to consummate; and the Court is called upon to say that the issue is not of that person *quem nuptiæ demonstrat*.

Under these preliminary observations on the circumstances of the case, it would be necessary, in order to support this suit, that the law authorities should be clear beyond all possibility of doubt. It has been said that the public has an interest that the real state of the parties should be ascertained, and that is true where the marriage is void under the marriage act: but this is a voidable marriage, and laid down to be so by Blackstone. Then here the state is ascertained. The marriage exists.

The sole authority in support of this suit is the text quoted from the Canon Law;—it is necessary to examine how far that law applies to this case, and how far it has been received in this country. X. 4. 15. 1. If a man alleges his frigidity, and wife alleges the same, and can prove the same, by seven compurgators, they may be separated.

X. 4. 15. 4. If a man contract, knowing the defect of the woman, 208. he is not to come for a remedy.

Many learned commentators have been referred to: but they leave the text much as it appeared at first. Sanchez, in his seventh book, has written a large Commentary on Matrimonial Law; upwards of 400 pages *De Impedimentis*. In his last disputation he considers it still as a question whether the impotent party may apply for the divorce; and he holds he may, under circumstances; but limits it by certain restrictions;—*quando illius ignarus fuit tempore matrimonii; aliter minime auditur*. But let us examine how the text and commentators apply to the present case. The Text applies to frigidity, which may be unknown before trial;—but here the bodily defect is stated to be apparent. In the next place the wife must join in the statement *eadem affirmans*: but here, she resists the suit. So far from joining in it, her pregnancy is proclaimed. But collateral proof is also required: it must be proved by seven compurgators; a mode of proof not used here, and which we cannot have instead of inspection and answers.

By the Canon Law the marriage is not absolutely dissolved; the par-

ties are separated; and if the church is deceived, the former marriage is to be renewed; and if a second marriage is contracted, it becomes null and void. What a state to place the parties in! This is something in the Text Law which I cannot readily assent to belong to the law of this country. If the marriage was contracted scienter, the party knew of the defect, and he could not be heard. The assertion of the defect in himself raises the presumption that he contracted the marriage scienter, that he cohabited scienter, and defrauded the woman.

If the Canon Law is to govern the case, the text referred to does not come up to the point;—even if it did, something more would be to be shown, namely, that it has been received as the law in this country;—it might not be necessary for this purpose to show a case precisely similar; it would be sufficient to show that it is according to the general rules observed here. But it is a strong, and almost a conclusive, presumption against the present proceeding that no suit appears ever to have been brought by any but the injured party.

384.2. Ayliffe(a) has been quoted, but he refers merely to the text of the Canon Law. Another authority has been cited from the opinion of counsel: but that was on the case of a woman. The opinion of any person of higher authority cannot be produced than of that person: but it cannot be considered as an authority applying to this case. The Court does not mean to lay it down that in no possible case, or under no circumstances, a woman may not be allowed to bring such a suit. But even if the Canon Law is direct on the point;—is it according to the Law of England to receive such a suit? It is a maxim that no man shall take advantage of his own wrong: it is the principle of the Canon Law itself, the principle of reason and justice. There is no instance of a suit brought by a person alleging his own incapacity: there is so strong a presumption for the marriage that no sentence is ever pronounced against it, except on the fullest authority, and if a mistake is made, the marriage is not held dissolved, but to be renewed. This is a situation in which the Law of England would not place the parties. On the whole I am not satisfied that the party would be entitled to the sentence prayed.—I reject the libel, and dismiss the suit.

(a) Parergon, p. 227.

CONSISTORY COURT OF LONDON.

COOPER and Others v. ALLNUTT.—p. 165.

A churchwarden duly elected by his parish directed to take the oath of office.

ARCHES COURT OF CANTERBURY.

The Office of the Judge promoted by JARRATT v. STEELE.—p. 167.

A lessee of an impropriator of great tithes canonically punished for breaking open the church door with intent to erect pews in the chancel.

The Office of the Judge promoted by DOBIE v. MASTERS.—p. 171.

The ecclesiastical courts have jurisdiction to try questions of simony.

PREROGATIVE COURT OF CANTERBURY.

ZACHARIAS v. COLLIS.—p. 176.

The will of a naval officer in favour of an agent on the advance of money requires very clear proof of the *animus testandi*; it is not valid when executed as a mere security for debt.—Will annulled.

JUDGMENT.

Sir JOHN NICHOLL.

This case respects the will of J. Malbon, an officer in His Majesty's Navy. It is propounded by Zacharias, the sole executor and universal legatee named in it, and opposed by Mrs. Collis, a sister of the deceased, who, with three other sisters, and a brother, are his next of kin,

As the will of a person in the sea service, it rests, in some respects, on peculiar considerations; for it is the policy of the law of this country, and of several others, to grant special indulgences, and to extend special protections to the testamentary intentions of this class of persons. In some particulars they are excused from observing the formalities required from other members of society, as in the case of nuncupative wills. While, on the other hand, greater formalities and special modes of attestation are in some respects required as to their written wills;—not, however, for the purpose of imposing restraints and disabilities upon them, but in order to protect them against fraud and imposition, and to secure due effect to their real testamentary intentions. In both respects the law appears to be founded in reason and justice:—for it is to be observed that this class of persons, generally speaking, are, in early life, separated, in a great degree, from the rest of society; and have not the same opportunities which others have of acquiring, imperceptibly, the knowledge of ordinary business and its forms. They may, therefore, be allowed, in some circumstances, to dispose of their property by will with less ceremony: but for the same reasons they are more liable than others to imposition, and to commit acts of imprudence. They are generally careless, unguarded, openhearted, and little prepared to defend themselves against the artful and designing part of mankind; yet they are more frequently under the pressure of urgent wants; and to procure an immediate supply to those wants (such as an outfit and the like) they will, without thought, comply with almost any conditions proposed to them, not weighing, or even being aware of, the future consequences. These temporary necessities operate upon them as a sort of duress, on the part of those who are to furnish the supply. These are partly the considerations on which the policy of the law is extended to guard the testamentary acts of this class of persons. Their wills are, in some respects, exceptions to the rules applicable to ordinary cases; not indeed exceptions to the great fundamental principle of all testamentary dispositions, *the intention of the testator*; but to some of the rules and presumptions by which the real intention is to be ascertained.

In this view, approaching the facts of the present case, I may properly look first at the history and character of the deceased party, in order to see how far these general considerations apply to the individual.

The deceased went early in life into the naval service. He became a lieutenant in 1804. He seems to have possessed a full share of that general character which belongs to his profession. He is described by those witnesses who intimately knew him, as "extremely careless," "inattentive to business," "unsuspicious, and would sign any thing put before him." We find him returning from sea in 1811, having, as lieutenant, commanded two small vessels: but so negligent in keeping his books, that his accounts could not be passed; and his pay and allowances were in consequence stopped. His own agent, Mr. Stanger, though probably not indisposed to assist him, was yet so far in advance that he would advance him no more;—and the deceased was at that time in considerable embarrassment.

It does not appear whether he made any applications to his relations, nor whether they were in circumstances to assist him;—he was one of rather a numerous family, having a brother and four sisters.

Such was the character and situation of the deceased a short time before the date of this will, which is June, 1811. It appears that he went to Portsmouth either in search of employment or of pecuniary assistance, or of both; for shortly after his return to London, in July or August, he told his uncle, Mr. Malbon, the witness, "that he had been obliged to apply to a Jew at Portsmouth; and to give him a power of attorney to act for him as his agent in order to get him to advance him some money." This is the deceased's own account of his first acquaintance with the executor and universal legatee named in this instrument. It accords also with the result of the evidence given by Zacharias's own witnesses; for it is in no degree proved that any previous intimacy or regard subsisted between the parties;—or that any other consideration led to this will, than the advance of money.

This brings me to the evidence offered in support of the factum of the instrument; and certainly it is as meagre as can well be imagined.

It may hardly be necessary to observe that the factum of an instrument means, not barely the signing of it, and the formal publication or delivery, but proof in the language of the condidit, "that he well knew and understood the contents thereof," "and did give, will, dispose, and do in all things as in the said will is contained." It is true that, under some circumstances, all this may be proved by presumption only, arising from the mere act of signing: but, under other circumstances, more direct proof of the "knowing and understanding," of the "willing and disposing," may be necessary.

On the condidit, which pleads the factum of this will, two witnesses have been examined;—one the shopboy of Zacharias; the other, a friend who was in the habit of lending his aid in attesting similar instruments. The former *Morris Jacobs*, who, at the date of the instrument, was under seventeen years of age, deposes in substance as follows:—"That he went to live with Zacharias, a navy agent and shopkeeper, in Point street, Portsmouth, as clerk, and to attend his shop, in 1811, and continued in his employ until November, 1812. That he had no knowledge of Malbon till sometime after he had been in Zacharias's employ:—but before June he had seen Malbon, who was then a lieutenant, several times at Zacharias's house, with whom he appeared to be rather

intimate;—and who, to deponent's knowledge, had done services to the deceased, by assisting him with money more than once previous to the said month of June. That on a day in June the deceased, who had not got a ship, had called on Zacharias, and was sitting with him in a parlour behind the shop. Deponent was called by Zacharias from the shop into the parlour;—and Mr. Rumley, a slop-seller, and near neighbour of Zacharias's, was sitting with them. That Zacharias then gave deponent a printed form of a will, which he had previously filled up in his own hand-writing, and told deponent that Lieutenant Malbon had already read it, that it was his will;—but that he, the deponent, was then to read it over to him;—that deponent thereupon immediately read the said will all over, audibly, slowly, and distinctly, to Lieutenant Malbon, in the presence of Rumley and Zacharias;—that the deceased appeared to approve the same, and immediately executed it by signing his name, and by sealing it, and by publishing it as his will." He then states that Rumley and he attested it;—and that the deceased was of sound mind. "That, immediately after the transaction was completed, he saw Zacharias give the deceased some bank notes." He says to the fourth interrogatory,—"That Zacharias was a Navy agent, and kept a shop for the sale of slops and other articles."

Sixth interrogatory,—"That he has no recollection of having seen the deceased at Zacharias's house after he executed his will."

Eighth interrogatory,—"That he supposes and believes the deceased was, at the time of executing the will, indebted to Zacharias for monies advanced to him;—he does not know whether there was or was not any intention on the part of the deceased to benefit Zacharias further than by enabling him, as executor, to satisfy the debt due to him out of his effects;—or whether the deceased did or did not intend to deprive his relations of all his property after payment of his debts;—nor can the respondent form any belief on the subject."

Tenth interrogatory,—"That Rumley is a wholesale and retail slop-seller in Point street."

The other witness, *Rumley*, deposes, "That he has been acquainted with Zacharias ten or twelve years;—and having always had a good opinion of him, as being a man very correct and particular in the transaction of his business, he hath frequently attended at his house, and seen many instruments such as orders for prize-money, wills, and powers of attorney, executed by seamen and officers, and has attested them;—at some times he did not see the person write his name;—but then he invariably saw such person seal and deliver such power of attorney or will, "as his act and deed;" and asked him if the signature was his hand-writing, and took care to be quite satisfied that the person, so executing the same, was not intoxicated, and was of sound mind."

He then says, "that he cannot bring to his recollection either having ever seen the deceased, or any part of the transaction;"—but, seeing his own signature of the attestation, he says "he is quite certain he either saw the deceased sign his name, or seal and deliver the same "as his act and deed;"—and did also fully satisfy himself that the testator was quite "sober and of sound mind."

To the eighth interrogatory he says, "that he cannot answer whether the will was or was not executed as a collateral security for the payment of any debt; neither can he form a belief whether there was or was

not any intention in the deceased to benefit Zacharias, farther than by enabling him, as executor, to satisfy any debt due to him out of the effects, nor whether he did or did not intend to deprive his relations of all his property after payment of his debts."

This is the whole evidence of the factum; and it amounts only to proof that the deceased did execute some instrument. The lad *Jacob* says that Zacharias desired him to read it over to the deceased, and he read it accordingly. This seems a strange ceremony to be performed by this shopboy to an officer in full health, who (as Zacharias said) had himself read it before. *Rumley* has no recollection of any such ceremony:—nor was it one of those ceremonies which he, in his great caution, was accustomed to require. *Jacobs* says that the deceased published it as his will. *Rumley* says, "that the usual form of executing powers of attorney and wills was to seal and deliver it *as his act and deed*,"—which, in truth, is the common way of executing sealed instruments such as this is upon the face of it. Without then giving implicit belief to every syllable stated by *Jacobs* speaking upon a recollection of five years;—frequently (it may be presumed) called in like *Rumley* to attest wills and powers;—nothing in this particular transaction to fix minute circumstances upon his memory:—there is no proof that the deceased knew the nature and import of the instrument which he executed, or that he himself declared it to be a *will*. The more natural instrument for an officer to execute to his agent was a *power of attorney*,—his own description to his uncle, on his return to London, is, that "he had given him a power of attorney to act for him as his agent in order to get him to advance him some money."

But it is urged "here is execution by a person in full health and capacity, and you must presume knowledge of the contents and import of the instrument;" and in ordinary cases the observation is true;—but it is for the consideration of the Court whether the same presumption arises under the circumstances of the case. Here is a distressed young officer, naturally of a very careless turn in matters of business, getting supplies of money from the slopseller, ready to sign any thing that might be put before him as a security;—and here is the slopseller, for the advance of a few pounds, obtaining a security which may convey to him thousands, in exclusion of the testator's nearest and dearest relations;—and, in addition, here is this striking circumstance that, immediately upon the execution of the instrument, Zacharias hands him over some bank notes;—looking more like the valuable consideration advanced for some security, than accompanying the voluntary disposition of property by will. It seems hardly possible not to suspect that some imposition was practised, and that the deceased was ignorant of the nature and effect of the instrument which he signed. The transaction takes place in this back-room behind Zacharias's shop. No intervention of any professional person. The instrument filled up by the most suspicious of all persons, by the executor and universal legatee himself;—a printed instrument with the King's arms at the top, and a seal at the bottom, like a power of attorney, or legal security;—only Zacharias's friend and the shop-boy present;—and, what is singular, it is not stated even by the lad, whose memory is so good, that the deceased uttered one single word in the whole course of the transaction, except the mere formal execution. Here he is in distress;—anxious to get his money, signs the instrument, without any great probability that

he attended to the lad's reading it, (if he did read it) receiving the bank notes and the whole is finished;—for Jacobs, though he lived seventeen months subsequently in Zacharias's service, never saw the deceased afterwards.

Here is no previous declaration of any intention to dispose of his property by making a will in Zacharias's favour leading up to this act;—here is no evidence of any subsequent recognition by mentioning that he had executed this will, or done any act to benefit Zacharias, except the declaration to his uncle that he had given him a power of attorney to act as his agent.

It becomes proper then to consider whether the instrument is proved to have been executed as a will, or only as a security for a debt;—and if as a security for a debt from a seaman to his agent, whether it will have the legal operation of being something which it was not *intended* to be, namely, a testamentary disposition of the deceased's whole property in exclusion of his relations.

To lead to such a will, there is no appearance of any previous intimacy or regard;—there is no trace of the deceased having had any knowledge of Zacharias till he went to Portsmouth a short time before the date of the instrument.

That the instrument was given merely as a collateral security for a debt, direct evidence can hardly be expected. The Court can only have circumstantial evidence:—and proof of that sort is sufficient. The circumstances satisfy me in this case:—even the attesting witnesses will not venture a *belief* that it was executed for any other purpose.

It is said in argument that there is no proof of a will and a power of attorney having been executed at the same time;—but Zacharias has not produced any power of attorney, nor proved that any other instrument than the will was ever executed. Take it either way;—either that only one instrument was executed, or that two were executed. If only one, then here is the deceased's own declaration that it was a power of attorney. If two instruments, then the case comes more directly in circumstances within the authority of the leading case of *Craig v. Lester*, to which I shall presently advert.

The executor, aware that collateral aid was necessary to support the factum, gave in a supplemental allegation, pleading continued affection, declarations and recognitions of this will;—but the proof has totally failed. The only witness produced to it is Laing, a shop-lad, who succeeded Jacobs;—and all he says is, that he overheard some conversation in which the deceased, after his return from abroad, expressed obligations to Zacharias. Supposing the conversation overheard to be as stated, it is not inconsistent with the deceased's ignorance of the nature and contents of this instrument. It might only accompany an assurance that he would immediately discharge his debt;—that he, Zacharias, should be the first person that he would pay out of the prize-money he had acquired:—for the fact is, that he immediately paid him, and took all his concerns out of his hands.

It is quite clear that he was suspicious of him, and was displeased at a difficulty in getting back some money he found out that he had overpaid him;—and was obliged to take a watch as one mode of balancing the account.

It is unnecessary to go minutely through the history of this part of the case;—but it may be proper to observe that though the Court can

seldom rely on single declarations as evidence of intention, yet the uniform tenor of declarations to confidential friends is of considerable weight.

The deceased, in his unreserved intercourse with his messmates, while abroad, with whom he was particularly intimate, never speaks with regard of Zacharias, nor recommends him to their notice;—he remits home two thousand pounds, not to Zacharias, but to Findlay and Co. Immediately on his return he again appoints Stanger to be his agent, and pays off Zacharias.

Residing in London from that time till his death, being about five months, he repeatedly talked over his family affairs with his uncle, and some other old friends with whom he lived in the most unreserved confidence;—he spoke of Zacharias in terms of great harshness and reproach. He talked of making a will, and of disposing of the bulk of his property to one favourite sister, Mrs. Collis, in preference to his other sisters, and his brother;—he had even made an appointment with a professional person in order to carry these testamentary intentions into effect;—but died unexpectedly before the time appointed. In all these conversations there was no hint that Zacharias was to be an object of his testamentary bounty;—no suggestion that he had ever made a will in his favour:—on the contrary, he declared “he had made no will.”

This evidence bears upon the case, not as admissible to affect the validity of an instrument, the *factum* of which had been fully established;—but as tending to show that the deceased never knew or intended this instrument to be a will;—that he supposed it to be a mere power of attorney, or a collateral security for the repayment of the money Zacharias had advanced to him.

Another part of the evidence may bear upon the case in the same way; and further, it may raise some question upon the point of revocation.

The deceased had desired Zacharias to deliver up all his papers. Zacharias sent an order to his sub-agents, in London, Hunt and M'Adams, to deliver them up; and they professed to have done so. The deceased desired a friend who was going to Portsmouth, in December, to call on Zacharias, and to enquire if he had any other papers. This witness accordingly applied to Zacharias, who told him he had delivered up all papers. “That he had no papers belonging to the deceased in his possession. That he had long before sent them all to Hunt and M'Adam, in London;—but that he would look again.” Some days afterwards Zacharias told the witness “that he had looked through his papers, and that he had not a single paper belonging to Mr. Malbon.” And yet all this time Zacharias had in his possession this will which he never produces till after the deceased's death;—but immediately on the death he produces it, coming up from Portsmouth, and is sworn to the probate in four days after Captain Malbon died.

Looking to the whole tenor of the evidence, there appears no doubt that if at this time, about a month or six weeks before the deceased died, the will had been delivered up, it would have been cancelled. Captain Malbon might indeed have been surprised by the appearance of such an instrument; for, in these enquiries after his papers, there is no allusion whatever to any will being in Zacharias's hands:—but, if any belief is due to the evidence, it is almost morally certain that the de-

ceased would, in some manner, have revoked this will, had it not been fraudulently kept back and concealed by Zacharias. Captain Malbon, however, died while intending to make a will quite of a different tenor:—that intention was intercepted in its progress by unexpected death.

These are the facts of the case;—and out of these facts the Court is to consider the legal result.

The statute of William, in consideration that wills and powers of attorney were obtained from seamen without them being aware of their contents and effect, rendered the will absolutely void, if embodied in the *same* instrument with a power of attorney; thus holding the presumption conclusive *juris et de jure* that the party did not know and intend that the instrument should operate as a testamentary disposition.

The case of *Craig v. Lester*, Deleg. 11th June, 1714, followed not long after the statute;—and in that case Sir Charles Hedges decided, and his sentence was affirmed by the Delegates, that the will was invalid, though executed on a different instrument. It was in that instance executed at the same time with a power of attorney, and by a seaman in favour of his agents as a mere security for a debt. It has been said that this was a bold stretch of the statute. It is, however, to be recollected that this was not a restraining, but a remedial and protecting statute, in order to defend this valuable, but unguarded, class of persons, against fraudulent imposition. It was not going beyond the spirit of the statute, nor departing from the principles of law and sound reason, to hold that an instrument, understood to be for one purpose, should not have an operation quite different, and much more extensive, when obtained from an unguarded seaman in the hands of his agent.

In the case of *Leake v. Harwood*, before Doctor Bettesworth, the will was set aside “as a security for a debt.”

In the case of *Anderson v. Ward*, before Doctor Bettesworth, 1749, the will was set aside. “as a security for a debt,” though there was evidence of the deceased having declared that his wife had used him ill.

In the case of *Moore v. Smart*, (or *Stevens*) before Sir George Lee, in 1753, from a note in the handwriting of the learned judge himself who decided the case which has been furnished by Dr. Phillimore, it clearly appears that the will was set aside on the ground of its having been merely a security for a debt. Sir George Lee held this to be a settled point. The ground is so stated clearly and distinctly by the judge himself as the foundation of his sentence. It does not appear to have been considered as at all important that a power of attorney should have been executed *at the same time*; nor would that circumstance operate as any guard or protection to the seaman, being so easily evaded by executing the instruments on different days. The true principle always relied upon has been that an instrument executed as a security for a debt shall not operate as a disposition of the whole property, unless the intention that it should so operate be made clearly to appear. But where that intention has been shown, the wills have been established.

In the case of *Hay v. Mullo*, 1756, before the same judge, Sir George Lee, and also from a note in his own handwriting, it appears “that as there was no proof that the will was made to secure a debt; but this rested only in the belief of a witness; and on the contrary it was proved by two witnesses that the deceased, a short time before his death, had expressed a great esteem, regard, and friendship, for Mullo, and

said his will and power were there, and that he had made a will in favour of Mullo, and in fact had suffered the will to subsist for above twelve years, though he was often in England, and might have revoked it if he had intended his relations should have his effects, he pronounced for the validity of the will.

In *Douglas v. M'Cumming*, before Sir George Hay, 1773,—the will was also established on similar grounds.

In both these cases, it is to be observed, there was evidence of affection and regard, and of intention to benefit by will;—and neither the statute nor the decisions meant to make the relation of agent and seaman, nor the circumstance of the seaman being indebted to his agent an absolute defeasance of the will, so that it could, in no case, be valid;—but only so far to alter the *onus probandi* as to require evidence of *intention* beyond the mere act of execution. The law meant to protect the *real* intentions, and not to disable the seaman from disposing according to his real wishes.

In *Lander v. Young*, before Doctor Calvert, 1785, the will was established upon the ground that the proof of the intention was sufficient, and that the testator understood the nature and effect of the instrument, saying, “It should be good if he died.” “If he died, he hoped God would bless him (the executor) with it;” “that he had rather Young (the executor) should have it, than the chest at Chatham;” so that there was direct proof that the testator knew that the instrument was to operate after his death, that it would convey his property to the executor, and that he intended it should have that effect.

In *Forbes v. Burt*, 1789, before Sir William Wynne, the will was set aside, not on the ground that it was given as a mere security for a debt, for the Court was of opinion that the circumstance was not sufficiently proved;—but upon the ground that the evidence of the *factum* was insufficient to support such a will. The judge said “it is extremely material that it should be proved the deceased knew it was a will, and not a power of attorney;—there were no recognitions of the act;—no proof that the instrument was ever in possession of the deceased;—strong evidence of affection for his mother and sisters, and that he was about making a will in their favour;—upon the whole that he could not apply the principle of the will being a mere security for a debt, because there was no proof of any debt;—but in the failure of that clear proof of the *factum* which the circumstances of the case required, he should pronounce against the will.”

From these cases the result to be deduced is, that when the relation of agent and seaman exists, there must be clear proof, not only of the subscription of the deceased to the instrument, but also of his knowledge of its nature and effect;—that wherever it is executed *merely* as a security for a debt, it shall not operate as a testamentary disposition of the whole property;—but on the other hand, though there may be a debt, yet if there be satisfactory evidence that the testator intended to dispose of his property by will, the instrument shall be valid.

Applying these principles to the facts of the present case;—the evidence by no means establishes, to my mind, that the deceased knew he was executing a will, having the effect and operation of giving his whole fortune to Zacharias in exclusion of his family. The evidence on the other hand satisfies me that whatever instrument the deceased supposed himself to be executing, it was merely in consequence of the

money advances made to him by Zacharias, and not with a view to testamentary benefit;—and that when he had paid the debt, and taken his papers out of Zacharias's hands, he did not entertain any impression that Zacharias had a further claim upon, or would derive any benefit from his property after his death. I am, therefore, of opinion that the factum, in the sense already given to that term, is not proved;—considering further that Zacharias, when required by the deceased to deliver up all his papers, declared that he had done so;—and, after a pretended search, repeated the declaration that he had not a single paper belonging to the deceased in his possession; yet fraudulently retained this instrument, which the deceased himself never saw except at the moment of signing it, under the circumstances already mentioned, I should feel great difficulty in holding the executor and universal legatee entitled to take advantage of his own fraud by obtaining probate of this will. Upon the whole, I feel bound to pronounce against this will;—but as Mr. Zacharias is now dead, and his representatives were not privy to the transaction, I shall give no costs.

PREROGATIVE COURT OF CANTERBURY.

STRAUSS v. SCHMIDT.—p. 209.

A recognition establishes testamentary papers which were conditional in their terms:—testamentary effect given to three letters.

IN June, 1788, George Lewis Hansen being at Liverpool, and on the point of leaving England, for the continent of Europe, delivered a sealed paper to Messrs. Heywood and Co., merchants, in that town, in whose hands he had upwards of 2,000*l.* at interest, with directions to them to open it as soon as they should hear of his death.

The letter was as follows:

Messrs. Heywood, Son, & Co.

Liverpool, 21st June, 1788.

Gentlemen,

In case I should die on my travels, I request the favour of you to remit my money which I have in your bank to Messrs. C. F. Hansen, I. C. Bangi, and G. G. Strauss, at Zinna, near Berlin; or to deliver it to Mr. John Blackburne, of this place, whom I have requested to-day, in a sealed letter, to remit the money to my said three friends at Zinna, at such a time as the exchange will be favourable to the three gentlemen, which Mr. Blackburne has promised me to do. I hope, from your kindness, that you will, in this affair, conjointly with Mr. Blackburne, do for the best.

I have now in your bank 2182*l.* 18*s.* 6*d.* sterling; and shall soon send to you, or to Mr. J. Dennison, in London, 2 to 300*l.* more.

Of all this I give the necessary information to the above mentioned three friends in Zinna. In case I should die, I humbly request you to acquaint the three gentlemen with my said will, in the German language, as they do not understand English. Your letters you may address only to one, viz. Mr. C. F. Hansen, at Zinna, per Berlin.

I recommend my friends to your kind remembrance; and am, with great respect, your most humble servant,

G. L. HANSEN.

On the first of July, 1788, he addressed the following letter(a) to Mr. I. C. Bangi, at Zinna.

My dear beloved Bangi,

How much I shall be able to write to you to-day I cannot at this moment ascertain.

If you know what offensive letters my brother wrote to me some time ago, you may easily imagine that I was very angry on account of it.—My displeasure is so great that I have grown grey and old since;—my digestion is very bad;—I am no more in good health nor gay.—The most clever physicians of Liverpool tell me that nothing but a sea-sickness can cure me. I have, therefore, taken the resolution to go to France to try if I can be sea-sick, and whether I am able to forget this shameful offence among the merry Frenchmen, and whether I can be easy again in my heart. I got to London a few days ago. All physicians whom I know here are of the same opinion as those of Liverpool, that I can only be saved by a sea-sickness;—therefore, as I may easily die, I think it to be my duty to write to you from here to inform you what you have to do with my property in case I should die. The cash I have at present in the Bank of Messrs. Arthur Heywood, Son, and Co. of Liverpool amounts to 2182*l.* 18*s.* 6*d.* of which I shall probably take out 206*l.* 9*s.*—so that 1976*l.* 9*s.* 6*d.* remain in their Bank. I shall shortly remit from France and from Flanders 270*l.* to 300*l.* sterling, which sum I do not exactly know: but you may calculate that I have 2270*l.* to 2280*l.* in the before mentioned bank of Liverpool.—Besides I have to receive of Mr. Lebins, at Newfarwasser, 190*l.* to 200*l.*; further, of Mr. Gene, at Stettin, 15*l.* or 16*l.*, both amounts I cannot exactly say, as I forgot to look over the accounts in Liverpool; it is, however, nearly as much, either a little more or less. Should I die, and these amounts have not been paid, you have to receive them of the above mentioned two gentlemen. Mr. Gene is inspector, and Mr. Lebins bookkeeper, both of the Maritime Trade Company. Should I live another year, I am to receive from 200*l.* to 250*l.* of Mr. J. Blackburne, in which case you will receive, in June, 1789, 2690*l.* 2700*l.* Moreover, there are in Liverpool, at Mr. Blackburne's, a bathing machine, three trunks, and three large chests, with clothes, linen, &c. Echaratt, and others, also owe me a little. Mr. Peel knows how much it is; and I wish you would receive it. All my money, things, and whatever I may possess, I leave to you and my brother's children, in equal shares, in case I die. Probably you know that one pound sterling makes 6½*Rf.* to 6*Rf.* 14*ggr.* Berlin currency. Messrs. Heywood understand the German language; they were at an academy at Hambro'; you may write to them in German. Mr. Blackburne is my particular friend, a very worthy Englishman. He does not know German; his letters may be translated to you by Mr. Zollner, or others. I left sealed letters to the care of Messrs. Heywood and Blackburne, which they are not to open

(a) This letter was not to be found. Mr. Benson had lost it: but he had a distinct recollection of the most important passages it contained. A draft of it, which had been found amongst the deceased's papers after his death, was propounded.

till I am dead. In them I order to transmit my money and effects to Mr. C. F. H., I. C. B. and G. G. Strauss; namely, to Mr. Martin Dormer, Hambrogh, by Mr. Blackburne's vessel. Mr. Dormer is Mayor of Hambro'. You may refer to this in your letters to Liverpool and Hambro'. You will be pleased to direct the letters as follows:—

Arthur Heywood, Son, and Co., Esquires, per Amsterdam, Liverpool.

John Blackburne, Esquire, Liverpool.

Mr. Martin Dormer, in Hambrogh.

Exactly so, my dear Bangi, Messrs. Messrs. and all titles are quite left out in English letters;—you neither say Sir when you write in German. In my sealed letter I requested the gentlemen to send you my money at such a time when the exchange is in your favour, by which Mr. Heywood gains nothing; but you do. The money is sent in bills for which any banker in Hambro', Berlin, Leipzig, &c. will readily pay you cash. Heywood and Co. are very safe and good people; you may, therefore, leave the money with them for years, and as long as you please, as the interest increases the capital. Of the above 218*l.* 18*s.* 6*d.* I have not received the interest. From this year Messrs. Heywood must pay you 5 per cent. interest.

On my journey to Northwick, Liverpool, &c. I lost 4 to 500 ducats, in case they are not at the bottom of my trunk; I have not examined it particularly. If you find them, so much the better. You; therefore, must request Mr. Blackburne to get all trunks, chests, &c. well corded and sealed. You take care of the needful in the Prussian dominions about opening, putting leads to it, &c. I think I have written the necessary to you now.

I had gained considerably three years ago: but I lost a great part by chicaneries with which I was not sufficiently acquainted. I shall write to you from France or Flanders, if I live. I leave London in a few days. If I do not get sea-sick on the short voyage, I shall not go to sea.

It is already late: my best respects to you and all our friends, and I shall never cease to be your true friend.

In September, 1800, the deceased returned from the continent; and took up his residence in the neighbourhood of London, where he continued till death.

On the 29th of April, 1816, he wrote a letter to F. W. Strauss, the son of G. G. Strauss, from which the following is an extract:(*a*)

“How would you and Bangi have acted respecting my property in England, and at Luckenwaldi, if I had died, or should now be soon dying? Do not think slightly of this case; and do not depend upon the honesty of the English, in particular upon that of the merchants, bankers, brokers, &c.; and in case you should fall in the hands of the English lawyers, you must expect to receive nothing.

Bangi never thought it worth his while to speak to me on the subject;—hardly a few words;—never proposing how and in what manner I could place my money more securely, and to advantage, in your country, either at 5, 6, 7, per cent. interest, or in adventures, &c. He never troubled himself about it. Last year I named to him an amount. I suppose he never took the trouble to calculate that I must be possessed

(*a*) The remaining part of this letter was wholly of a private nature.

of much more money than what I had stated, as he knew that I never drew the interest; but had it added every year to the capital, by which means the same is doubled in fourteen years and a quarter.

In England all property left without a will, signed by three witnesses, belongs to the king. I have not made a will; for this is even expensive. Mr. H. has in his possession a sealed letter dated in the year 1788, when I left Liverpool; and in which I wrote him that my brother and Bangi shall have my money in case I should die.

When my brother died, I informed him that Bangi and your father should receive my money from him. I have not communicated to him yet the death of your father. Bangi is seventy-two, and I am seventy years of age. Consider how precarious, how uncertain, we stand. I always hoped Bangi, or my brother, or your father, would have told, or written to me, every particular circumstance, how and in what manner I could place my money securely in your country; but no.—This appeared to me strange, and made me indifferent.”

The deceased died in November, 1818, leaving Charlotte Louisa Bangi, his sister, and a niece, the daughter of his brother, C. F. Hansen, who would have been entitled to distribute his personal property if he had died intestate. His personal estate consisted of 3,228*l.* in the hands of Messrs. Heywood, Son, and Co.; and of property elsewhere amounting to 623*l.*

The three letters together with an English translation of them, for the originals were written in German, were propounded in an allegation, as containing together the last will of the deceased, by Johanna Frederica Strauss, widow, the daughter of John Christian Bangi; and, as such, one of the universal legatees under the said testamentary instrument.

Burnaby and Lushington against the admission of the allegation.

Jenner in support of it.

JUDGMENT.

SIR JOHN NICHOLL.

This case very much depends on the construction of the papers. The deceased was a German, who had resided fourteen years in England. In 1788, he wrote two of the papers propounded, and then went abroad in search of health;—he writes to a house at Liverpool, in case of his death, to send his money to Germany;—he had money in their hands;—he was not only a foreigner, but he was ignorant of our laws;—his expressions, therefore, are not to be construed too strictly;—the Court is to look as much as possible to the intention;—the first letter is dated from Liverpool, in 1788. It is addressed to Messrs. Heywood, Son, and Co. his agents there;—and requests them, in case of his dying on his travels, to remit the money he has in their Bank to Messrs. C. F. Hansen, I. C. Bangi, and G. G. Strauss, at Zinna, near Berlin.

In another part, after stating the amount of the money, he proceeds: “Of all this I give the necessary information to the abovementioned three friends in Zinna. In case I should die, I humbly request to acquaint the three gentlemen with my said letter in the German language, as they do not understand English.”

A few days afterwards he comes to London, and arranges what he clearly intends to be a disposition of his property;—his object is to get his money sent out of England. “All my money, things, and whatever I may possess, I leave to you and my brother’s children, in equal

shares, in case I die;" and in which part he says, "I left sealed letters to the care of Messrs. Heywood and Blackburne, which they are not to open till I am dead."

These two papers together are admitted to be testamentary papers, which would have operated had his death taken place during his absence from England; he was fourteen years absent.

Courts, however, are cautious how they construe conditions of this sort. I have looked whether it is an absolute condition, or dependent on any particular motive operating at the time. It does not say it is to take place only in the event of his dying: if on the return of the deceased in 1802, by subsequent acts he has recognized these papers, I should not hold his return to be such a defeasance as to invalidate the will. If he had returned, and taken no notice of the paper, his silence would have put a construction on it;—if, on the other hand, his conduct shows that he was mindful of it, the Court is bound to carry his intentions into effect.

The case turns on the construction of No. 3.: it is dated in April, 1816;—it is addressed not to one of the three persons to whom the money was to be remitted, for events had changed;—two of them were dead;—the third had become advanced in life;—he writes to his great nephew, directing and informing him, and there are passages which show that he considered the papers as conveying directions respecting his property, especially No. 1. and No. 2. mixed up with No. 1. The parties who were to inherit were not dead. "How would you and Bangi have acted respecting my property in England, and at Luckenwaldi, if I had died, or should now be soon dying? Do not think slightly of this case; and do not depend upon the honesty of the English, in particular upon that of the merchants, bankers, brokers, &c.; and in case you should fall in the hands of the English lawyers, you must expect to receive nothing."

It is said this shows the loose way in which he expresses himself;—and so it does:—but these are the parts which more expressly recognize them.

"In England all property left without a will, signed by three witnesses, belongs to the king;—I have not made a will, for this even is expensive. Mr. H. has in his possession a sealed letter dated in the year 1788, when I left Liverpool, and in which I wrote him that my brother and Bangi shall have my money in case I should die."

This is a direct recognition of the existence of a letter which was not to be opened till after his death;—he goes on recognizing this direction;—he keeps the disposition alive. "I have not communicated to him yet the death of your father."

I think the deceased did not consider his returning to this country as a revocation. These circumstances show that he regarded these letters as important, which were to direct the disposition of his property; and, therefore, I think the Court is warranted in admitting this allegation to proof.

SALMON and Others v. CROMWELL.—p. 220.

Admission of an exceptive allegation suspended.

GILLIAT v. GILLIAT and HATFIELD.—p. 222.

Probate not necessary for a will appointing testamentary guardians.

Per Curiam.

From the decisions which have taken place it is quite clear that it is not necessary that a will appointing testamentary guardians should be proved in this Court.

ARCHES COURT OF CANTERBURY.

PARHAM v. TEMPLAR.—p. 223.

An appeal from the Dean and Chapter of Exeter lies to the Court of Arches, and not to the Consistory Court of Exeter.

REDDALL v. LEDDIARD.—p. 256.

A marriage declared null because the guardians of a minor were not appointed by an instrument attested by two witnesses.

5 E.C.R. 126-30. CONSISTORY COURT OF LONDON.

LADY HARRIET BLAQUIERE v. BLAQUIERE.—p. 258.

Allotment of permanent alimony.

JUDGMENT.

SIR WILLIAM SCOTT.

The parties having lived together three years after their marriage, separated in 1814, on account of differences:—what they were, whether arising from incompatibility of temper, does not appear;—310*l.* per annum, the produce of the wife's own fortune, were settled on her;—and this sum has been continued to her ever since. It has occurred in this case that while they were living in that state of separation the husband committed an act of adultery, which possibly might not have occurred in other circumstances. His separate income amounts to 750*l.* or 800*l.*; and the question turns on the deduction of 160*l.* per annum, the interest of money borrowed for the improvement of a house and land he has purchased in Sussex, which he says after the improvements are deducted are not worth more than 160*l.* per annum; but it is to be remembered at the same time that he has the enjoyment of this house of which she has no participation. On what ideas this sum of 300*l.* per annum was originally settled we have no account: it is the bare produce of her own fortune. I cannot think the 160*l.* per annum quite clear from claim on her part; she is entitled to some consideration for the want of a residence. At the same time it would be improper to dismiss out of

my consideration that there are two sons who are to be maintained in a rank corresponding with that of the father and mother;—and not only to be maintained, but to be educated. I think I shall not depart from a just consideration of the effect of these circumstances, if I give a moiety of this 160*l.* in addition to the 300*l.* per annum now paid to the wife.

PREROGATIVE COURT OF CANTERBURY.

HUNTER v. BULMER.—p. 260.

Where a party intervening in a cause, alleges that he proceeds no further, costs given.

ARCHES COURT OF CANTERBURY.

6*H* 373.

BEEVOR v. BEEVOR.—p. 262.

An application on the part of the husband to be relieved from taxation of the costs of the wife, rejected.

The Office of the Judge promoted by KEMP v. WICKES.—p. 264. *H* 277.

A minister of the Established Church cannot refuse to bury the child of a Dissenter.

NORTH v. BARKER.—p. 307.

Dilapidations at St. Cross—conflicting estimates;—the tender of the defendant affirmed with costs.

PREROGATIVE COURT OF CANTERBURY.

PRENTICE v. PRENTICE.—p. 311.

A proctor condemned in costs for improper practices in the conduct of a suit.

WOOLLEY and GORDON v. GREEN.—p. 314.

An application to continue a certificate of service before a process served on the Royal Exchange had become returnable into Court, rejected. An administration with the will annexed, granted to a creditor, limited to filing a bill in Equity.

CHARLES PERKS, of Walsall, in Staffordshire, died in July 1819, having made his will but appointed in it neither an executor or residuary

legatee. He had no child: but he left a widow, brothers, and a sister, and the children of a deceased sister.

Isaac Newton, one of the legatees, instituted a suit to prove the will, which was contested by Samuel Perks, one of the next of kin. The other next of kin were cited by a decree to see proceedings. In May 1820, the several proctors who had appeared in the cause, declared they would proceed no further. On the termination of this suit, a decree was taken out by Messrs. Woolley and Gordon, bankers, at Birmingham, and creditors to the estate of the deceased; calling upon all parties entitled in distribution to accept or refuse administration, with the will annexed, of the goods of the deceased, or to show cause why it should not be granted to them as creditors. Charles Green, one of the parties entitled in distribution, a private in the 11th of Dragoons, being with his regiment in India, the decree, according to the custom observed on such occasions, was served on one of the pillars of the Royal Exchange, and not returnable into Court till the 19th of this month.

Lushington moved the Court to dispense with the formality of awaiting the return of the process, on the ground that the necessity for a representative to the deceased was urgent.

Per Curiam.

The instrument has been served on the Royal Exchange. By practice it has been usual to continue that by certificate until another Court day: but here the Court is applied to continue the certificate before the process is returnable, on the ground that it is a mere form, and that the person cited being in India it is impossible he can appear. It is possible that he may return before the time has expired—but the object is to give notice to his friends, and to any agent he may have in this country. Under the circumstances of this case, I would have granted a limited administration, if the necessity was pressing for carrying on proceedings in the Court of Chancery: but to accede to this motion would be quite breaking down the form of the process, which I should be unwilling to do;—as long as that form is preserved, the Court must not depart from the line of practice prescribed by it.

Administration was afterwards applied for, limited to filing a bill in equity, and granted.

LYON v. FURNESS.—p. 316.

Answers on oath not to be dispensed with.

BARTHOLOMEW and BROWN v. HENLEY.—p. 317.

Three checks on a banker pronounced codicillary.

JUDGMENT.

Sir JOHN NICHOLL.

The party deceased is John Eyre Bartholomew. He died on the 22d of February 1819, leaving a widow, a son, and a daughter; he was possessed of a small real estate, and of personal property amounting to from 7 to 10,000*l.*—He had lived apart from his wife, and had for sev-

eral years before his death cohabited with a Miss Saunderson—he had a high regard for her—by his will of the 12th of November, 1813, he bequeathed to her the rent of two houses in Avery Row, all his household furniture, plate, money in his house, and a third in reversion of 2000*l.* in the event of the death of a son he had by her, before he should attain the age of 25 years.

There is a paper dated the 13th August, 1814, by which he gave her the improved rent of a house in Grosvenor-street—this is all in the deceased's handwriting, but not signed;—this is admitted to be a codicil.

A check is produced dated the 16th of January, 1817, for 250*l.*; another of the 4th of November, 1817, for 500*l.*; and nine months afterwards another check for 150*l.*;—corresponding entries to them are made in the check-book.

The first entry is “2808, Jan. 16, 1817. I give this check to Miss Eyre, for fear any thing should happen to me before I can make a codicil to my will, 250*l.*” The second entry is “2544. I give this draft to Miss Eyre, being very ill, for fear any thing should happen that I should die, as it is my intention to make another will in her favour.” The third is, “June 16—18, Miss Eyre. This draft to be paid from my bankers, in case I should die, 150*l.*”

These several checks and entries are pleaded as codicillary—on the other side it is pleaded that they were only written during occasional illness, and have no effect; and that he wrote checks for others;—that he died suddenly, and that payment of the checks was not applied for till after his death.

The question for the Court to consider is, whether, under these circumstances, the instruments are a part of a testamentary disposition of the deceased; or whether they became void on his recovery; or whether he intended only one of them to operate; or whether each is to be added to the other.

Paper B. is in the form of a codicil; but these three are not so. Indeed it must be admitted that the papers are not in a testamentary form: but that is not necessary. Deeds of gifts, or letters if dispositive of property and to be consummated by death, have effect, although the deceased might not be aware that he had performed a testamentary act. Even if they are testamentary, the Court must enquire if they are contingent or cumulative.

This Court is often called upon in cases of this description to ascertain the real intentions of the testator. On the face of these papers I think they are testamentary; they are directions as to the property after death;—there is nothing to make me think them provisional. It cannot be denied that if he had died immediately after writing the drafts, they would have been valid. If they would have been good at that time, it is for the party opposing them to say when they ceased to be good; the construction usually put on such instruments is this, “in case I neglect the opportunity of making my will, I wish this to be a protection against my own negligence and omission.” This is the only safe construction which can be put. I do *not* consider a certain time imposed during which they are to be good, as the deceased has imposed no time himself.

In the next paper he states “*for fear any thing should happen to me that I should die;*”—500*l.* This is much too large a sum for the purpose suggested of immediate supplies after death;—this is an abso-

lute benefit, not a condition the deceased imposed on himself. The third draft states “*in case I should die 150l;*” this is not like a substitution, it is a much smaller benefit. The general principle is, that bequests are *prima facie* to be taken cumulatively where they are on separate papers, unless they are revocatory of each other. It is observable also that the deceased was not then in a dangerous state; from the very words of one of them, it was most clearly intended to be an addition to his will.

This is the view the Court is disposed to take of the papers. His mode of carrying his intentions into effect is singular: but the only point for my consideration is, whether he intended the party to have the benefit. Suppose a bank note in an envelope with a similar endorsement to this, no one can doubt what the effect would be—indeed I remember a case of that sort;—although cases are seldom precisely similar, the Court must endeavour in all of them to extract the intentions of the parties.

These observations arise on the face of the paper; the circumstances and evidence lead to the same conclusion. The deceased’s wife had deserted him, and he was not on terms of civility with his son; he was desirous of marrying Miss Eyre, and had resorted to legal advice to ascertain whether he *could do so*. It is clear from the other testamentary papers, that he intended to increase the provision for Miss Eyre. In 1813 he made his will; in 1814 he wrote paper B.; in 1816 and 1817, new wills were begun; and it is clear from the contents of those papers that he intended a very considerable addition to Miss Eyre. It is not then improbable that he should from time to time do further acts in her favour; he spoke of her as extremely attentive to him during his illnesses; and there is considerable probability that during these illnesses he intended to increase the benefit he destined for her.

These drafts on the death of the deceased are in the possession of Miss Eyre. It has been argued that the receipt of one draft must put an end to the preceding one, and so on; the one putting an end to the other; but there is nothing on the checks themselves to show that such was the opinion of the deceased.

With respect to the parol evidence, one witness Bell, a friend of the deceased’s has been examined, who deposes, that he had often heard the deceased speak in terms of regard for Miss Eyre. He states that the deceased referred to these checks, although he cannot fix the time of his doing so; and the Court cannot rely strongly on this: but where it is in concurrence with the other evidence, some reliance is to be placed on the statement.

On the whole I am bound to look to benefit intended; and although it has been done in an anomalous form, it is the duty of the Court to carry into effect the intentions of the deceased, and to consider these papers as a part of the will and codicils of the testator.

PARKIN v. BAINBRIDGE.—p. 321.

Legacies drawn over by a pencil holden not to be cancelled.

JUDGMENT.

SIR JOHN NICHOLL.

The question before in this case was whether Mr. Bainbridge was to

be considered as joint executor and residuary legatee. The case has since been before the Court of Chancery, and is now sent here to ascertain whether certain legacies are revoked.

Certainly these legacies were once a part of the will,—pencil lines are drawn across them;—the question is, whether they are drawn for cancellation or deliberation. Where the crossing of an instrument is in pencil, it is as valid if it is intended as a cancellation, as if it was in ink; but it is more equivocal as to intention: persons are apt to make pencil marks for memoranda. Till I am better instructed, I shall hold them to be equivocal. I will reserve my opinion how I should decide, if no facts could be alleged on either side, till called upon for a decision upon such a case.

Here are circumstances which tend strongly to show that the deceased considered these as acts for subsequent deliberation;—on the face of the paper such is the presumption:—in some instances where he had first crossed them in pencil he afterwards crossed them in ink, he did not consider the pencil as the final alteration. Where he did not pursue the same mode, I infer that he had not decided on the revocation.

Another fact appearing on the face of the paper, is that he carries out and casts up the amount of the legacies. Where he has struck through the legacies with ink, he has altered the casting up, so as not to include the legacies so revoked: but the legacies struck through only in pencil are still included in the casting up of the total amount of the legacies.

The last ground is, that the Court has held, and it was admitted that the deceased did not mean to revoke by pencil marks, for the name of Mr. Bainbridge the executor and residuary legatee has been drawn over by pencil: but it has been established by the averment of Mr. Bainbridge and Dr. Lettsom that the deceased did not consider Mr. Bainbridge's name erased;—he continued to treat him as his executor, and directed his will to be delivered to him and Dr. Lettsom after his death;—if Mr. Bainbridge was not revoked by the pencil-marks, what reason have I to suppose that the other legatees are? The deceased's conduct leads to an opposite inference.

On the whole, I am of opinion that the deceased did not consider these legacies as revoked,—and that they are a part of the will of the deceased.

BUCKLE v. BUCKLE.—p. 323.

The presumption, arising from an attestation clause without witnesses, repelled.

JUDGMENT.

SIR JOHN NICHOLL.

Lewis Buckle is the party deceased;—in August, 1818, he wrote a testamentary paper which was found sealed up at his death; and from the appearance it should seem that he did not intend it to be opened again.

Although the will is expressed in eccentric terms, there is nothing in it which indicates any want of capacity. But there is an attestation clause without witnesses, which raises a presumption against the paper; yet it is a slight one, and the sealing up seems sufficiently to show that he did not intend the paper to be witnessed. The hand-writing and

finding are admitted:—I think I must conclude that it was the intention of the deceased that it should operate in its present form; and I pronounce for the paper.

165.

CONSISTORY COURT OF LONDON.

4H. 550. 2. 548.

BRIGGS v. MORGAN.—p. 325.

34229.

It is competent to a man to bring a suit of nullity of marriage against a woman for natural malformation.

THIS was a suit for a nullity of marriage, brought by a man against his wife, by reason of incurable natural malformation, and bodily defects in her person. She was described in the libel as having been a widow when he married her.

Arnold and *Phillimore*, referred to *Grimbaldeston's case*, Cons. 1777. *Arches*, 1779; *Wilson v. Morris*, Cons. of London, 1785; *Guest v. Guest*, Cons. of London, May 20, 1820.

Jenner and *Lushington*, contra, referred to *Greenstreet v. Comyns*, ante, p. 165. *Mascardus De Prob.* 311. *Brown*, 2. 14. 16. *Oughton*, 215. *Sanchez*, 7. 107. *Godolphin*, 492. 2. 36.

JUDGMENT.

SIR WILLIAM SCOTT.

This suit is brought on the ground of alleged impotency. Cases of this nature are said to be of rare occurrence; and that three only have been brought by the man within the last 60 years, and that these have been unsuccessful. A person need not be a profound physiologist to know how rarely the structure of the body is deficient for the purposes of our nature. Malformation is not common in our sex, and perhaps is still more uncommon in the other; and where it does exist, and is known to the parties, it naturally deters them from contracting marriage;—and where it is otherwise, there may be many reasons, some good and some bad, which may prevent them from applying to a Court of Law for redress. The possibility of the case is not denied: the topic is known to form no small extent of discussion in the canon law. Unless the possibility is denied, the right of complaining can hardly be denied to the husband: the rights and duties of both parties are co-equal, whether the failure is on one side or the other. I am inclined to pay as little deference to the objection taken on the ground of the "indelicacy" of the proceedings. Courts of Law are not invested with the powers of selection; they must take the law as it is imposed on them. Courts of the highest jurisdiction must often go into cases of the "most odious nature," where the proceeding is only for the punishment of the offender;—here the claim is for a remedy, and the Court cannot refuse to entertain it on any fastidious notions of its own.

In *Harris v. Ball*, the judge rejected the libel: but the Court of Delegates on solemn argument rejected that decision, and decided in favour of the complainant.

It has been said that the evidence must be such as would lead to no certain conclusion: but this is equally applicable to every case of the same description, and would go to show it is wrong to give such a ju-

risdiction. The expectation of infirm evidence may induce greater caution: but is not to preclude parties from having recourse to those modes of proof which the law allows.

These general objections must be dismissed:—but it is said, there are particular objections,—viz. that the woman had been the wife of another man who had never complained. As to how long, or why he acquiesced, we are all in the dark; a variety of reasons good or bad might have prevented him from complaining. In my view, however, the conduct of the first husband can form no more than a presumption; it cannot be considered as an estoppel to one man's grievance that another has not brought his forward.

Another objection taken is the age—which has not been stated in the libel. The woman may be advanced in life; and I do go the length of saying that private disappointment should be submitted to. The man is pleaded to be of sound health,—the age of the woman does not appear; if he has married a woman of an advanced period of life, he must bear the consequence.

The great and final objection is, that the suit is premature, and that the triennalis cohabitatio is required—on all consideration of reason, and on examination of the authorities, I do not think that this rule applies to the present case; where the infirmity can be ascertained at once, this cannot be required. All the great authorities, ancient and modern, subscribe to this, which is the rule of reason, from the Digest of the canon law to Brown, and the oracles of our own practice, Godolphin and Oughton.

I am disposed therefore to admit the libel, but not at present; for I shall give the adverse party an opportunity of stating any thing in the way of protest which may induce the Court to abstain from allowing any further proceedings against her.

Affidavits were exhibited on both sides, and the effect of them argued at some length.

JUDGMENT.

SIR WILLIAM SCOTT.

This proceeding is brought by James Briggs, against Sarah Briggs his wife for a nullity of marriage on account of incurable defect and natural malformation;—the marriage took place on the 16th of February 1819, she being a widow, and having lived with a former husband for eighteen years. It appears that James Briggs is in his forty-second year, that is, he will enter into his forty-third year in January next. She is some years older, being now in her fiftieth year, and in January next will enter into her fifty-first year.

No dissatisfaction was expressed on the part of the husband till March 1820;—the libel was brought in on the second of June 1820. The libel is short: it alleges the incapacity to exist; that it is natural and incurable, as will appear by the inspection of matrons and other lawful proofs; and prays that the marriage may be pronounced null and void.—When the libel was first offered, the Court was disposed to consider, that unless something could be shown in the way of protest on the part of the wife, it must be admitted. The subject itself is fair ground of complaint. Parties marry for offspring; for the enjoyment of each other's person. Natural malformation is of rare occurrence in either sex,—and is more rare in the female than in the male sex. Still instances do occur: *410.

sometimes they are without the knowledge of the party. Where it is with the knowledge, it is a gross fraud, and a grievous injury. In either of these cases the law provides a remedy; and it is the duty of the Court to supply the remedy on complaint being made.

408. It has been said that the modes resorted to for proof on these occasions are "offensive to natural modesty:"—but nature has provided no other means; and we must be under the necessity either of saying that all relief is denied, or of applying the means within our power. The Court must not sacrifice justice to notions of delicacy of its own.

216. If there is just reason either to suspect the truth of the statement, or to think the injury inconsiderable, the Court will hesitate before it descends to "modes of proof which are painful."

109. The age is entitled to great consideration. The injury is very different from that which may occur in an earlier period of life, at a time of life when the passions are subdued, and marriage is contracted only for comfortable society. The exposure also of the person at an advanced stage of life may be felt with greater abhorrence, and complied with with much more reluctance, than in the case of a younger person.

409. On considerations of this sort the Court desired the ages to be stated before the libel went to proof. The woman is near fifty, beyond the ordinary crisis of female life—little likely to have children; and it does not appear that she had children by her former marriage. His age is less advanced; he might form other expectations if he had married a younger woman. At any rate the fact standing thus, I must order the process of the Court to be executed upon a woman in her fifty-first year. I should feel much reluctance on this ground, if this were the only objection. The man is a little advanced beyond the octavum lustrum, approaching to the period when a philosopher has stated, that desires are no longer in a state of unsubdued provocation, but must be held to be under reasonable controul; and he therefore may be fairly left to just reflection, and more placid gratifications.

But this is not the only objection. I see reason to suspect his sincerity.

First, from the lateness of the complaint;—the libel is brought sixteen months after the marriage, it is a case to which the triennalis cohabitatio does not apply. Surely it did not require more than a twelve-month to discover this defect.

In the next place with respect to the natural malformation. She swears most unreservedly that she had constantly carnal intercourse with her first husband for eighteen years till near the time of his death. This is confirmed most materially by the laundress, who washed their linen for many years, and who describes marks which might be denominated as certain indicia of real matrimonial connexion; there cannot then be any natural malformation as he avers; it must be then a case of supervening infirmity to which the most vigorous persons are subject in the decline of life, this would not be a case for the Court to interfere in.

Thirdly, he has brought forward a history to which no credit is due, viz. that she lived on bad terms with her former husband, the fact being that they lived on terms of the greatest harmony and affection, so much as to be an object of notice and commendation to their friends and neighbours. And it is confirmed by her husband having made a bequest of his whole property to her, leaving his own sister unprovided

See also. Lane on Libel & to note at

for, and having a family to maintain; and though his sister applied to him to make a different disposition just before his death, which he repelled with indignation, and expressed himself most strongly in favour of this woman.

The party proceeding here alleges likewise a cohabitation of the former husband with another woman; as to which it appears that the cohabitation with this woman was before marriage, and broken off on that event taking place. The only witnesses to the contrary are the disappointed sister, and a person whom I suppose to be the attorney in the cause, who speaks to some allusions wholly overturned by other evidence in the case which proves that he lived happily with her, and remained true to his own spouse in life and in death.

On every ground I shall act improperly if I were to wade further in this business. He must find his remedy either elsewhere, or in his own patience. I shall not subject the woman to the process consequent on the admission of this libel, under such proof of the husband's insincerity; and I dismiss this proceeding.

PREROGATIVE COURT OF CANTERBURY.

DEAN v. RUSSEL.—p. 334.

The wife of an executor an incompetent witness in a cause touching the validity of the will under which her husband is executor. An application for the payment of costs out of the estate of the testator refused.

In this cause the wife of one of the executors of a will which was contested was produced and examined as a witness. The executor had no legacy.

At the hearing of the cause the evidence of this witness was objected to, and the Court sustained the objection.

In the same case upon an application for the costs to be paid out of the estate of the testator,—

Per Curiam.

It is only under special circumstances that the Court directs costs to be paid out of the testator's estate;—indeed, it is only in modern times that it has found itself (a) authorised so to do. In this case the party might earlier have judged that he ought not to have proceeded so far in the cause.

(a) In *Henshaw and Hadfield v. Atkinson*, and *Atkinson v. Passey and Hemming*, Deleg. 1814, on an appeal from the Prerogative Court of Canterbury, the costs of the several parties in the cause in both Courts were decreed to be paid out of the estate of the testator. Judges Delegates—Mr. Justice HEATH, Mr. Justice LE BLANC, Mr. Baron WOOD, Dr. PARSON, and Dr. PHILLIMORE.

CONSISTORY COURT OF LONDON.

The Office of the Judge promoted by GILBERT v. BUZZARD and BOYER.—p. 335. 3 1/2 d.
10 1/2

The use of iron in the structure of coffins, not unlawful:—but they are not to be admitted into churchyards on the same terms of pecuniary payment as coffins of ordinary wood.

ARCHES COURT OF CANTERBURY.

BUTTER v. ROBSON and HOLLAND.—p. 368.

In a libel for a legacy, the averment of the legacy should be in the exact words of the will.

A LIBEL was given by Joseph Butter against Richard Bateman Robson, and Richard Holland, the executors of Henry Holland, for a legacy bequeathed to him in the following terms:—"To each and every of my servants and clerks who shall have lived with me or been in my service for three years two years' salary or wages, at the rate of such salary or wages as they have previously received."

Swabey in opposition to the libel, referred to *Townshend v. Windham*, 2 Vernon 546.

Adams contra.

JUDGMENT.

Sir JOHN NICHOLL.

In a common libel it is not only unnecessary to go into a minute description, but it is more regular and proper to follow in the averment the exact words of the will. I think the averment in this action is exactly within the words of the will; and it lies on the other party to show that the claimant, though he was in the deceased's service, was not within the words of the will;—this may be alleged in the way of answer: but I am of opinion that it is properly pleaded here, and I shall admit the libel.

Libel admitted.

PREROGATIVE COURT OF CANTERBURY.

CHAPMAN v. WHITBY and PARSON.—p. 370.

The admission of an allegation exceptive to the general character of a witness suspended till the final hearing of the cause.

WEST and SMITH v. WILLBY.—p. 374.

An administration granted to creditors in preference to a grandmother who had been appointed guardian to minors; and having renounced the administration, had prayed to be re-appointed before the administration passed the seal.

WILLIAM SAMPTON, of Oxenden in the county of Northampton, died on the 18th of August, 1820, leaving a widow and three children, the eldest of whom was not more than thirteen years of age. The widow died five days after her husband, and without taking out any letters of administration to his effects.

The children elected Elizabeth Willby, their maternal grandmother, to be their guardian, for the purpose of renouncing their right to letters of administration of the goods of their deceased father; which guar-

dianship she accepted, and having formally renounced her right to the letters of administration, William West and Joseph Smith, two creditors, were on the 1st of September, sworn administrators, and entered into the usual bonds:—but on the 4th of September, before the administration had passed the seal of the Prerogative Court, a caveat was entered against it; and Austen appeared as proctor for Elizabeth Willby, and alleged that her grandchildren had retracted the election heretofore made of their grandmother to be their curatrix or guardian for the purpose of renouncing their right to the letters of administration of the goods of the deceased, and had re-elected the said Elizabeth Willby to be their curatrix or guardian for the purpose of taking upon her the letters of administration for their use and benefit until one of them should attain the age of twenty-one years; and that Elizabeth Willby herself had expressly retracted the renunciation before made by her as guardian to the minors, of the letters of administration, and applied for the letters of administration to be granted to her.

Fox, proctor for the creditors, prayed to be heard on his petition against the grant of this administration;—and he was assigned to be heard on the caveat day in October. On that day (i. e. the 3d of October) he alleged he had delivered his act to Austen, who was assigned to return the same to Fox on the first session of Michaelmas Term (viz. 6th of November;) the assignation was continued till the next Court. On the 11th of November notice was given to Austen, that unless he delivered his reply to the act on petition on the second session, application would be made to the Court to hear the cause *ex parte* on Fox's act already delivered.

On the second session of Michaelmas Term (viz. the 15th of November) Fox alleged that Austen had not returned the act; and prayed leave to bring in a copy of it, and that the judge would hear the same *ex parte*; and the Court gave leave accordingly, and assigned to hear the cause on the next Court day.

Phillimore moved the Court to allow the act on petition given in by Fox, and the evidence adduced in support of it, to be read, in order to found upon it a notice that the administration should be granted to William West and Joseph Smith, the two creditors who had been already sworn as administrators, and also give the usual bonds for the due performance of their functions.

Dodson, contra, contended,

That the next of kin had a full right to claim such a re-appointment as this;—that it was the daily practice of the office to grant such, nor could the grandmother be concluded by the hasty act of renunciation;—he asserted that she did it, as he could prove, under threats, and undue means of intimidation; that he could prove also that the estate was not, as has been stated, insolvent. Under this statement, he prayed to be allowed to reply to the act given in.

Phillimore in reply.

Per Curiam.

No reason has been assigned why the act has not been replied to long ago. This delay must be accounted for, or the case must be heard upon an *ex parte* statement of facts. If you go upon the merits of the case, and stand upon the right of retracting I am willing to hear you on that point. And then the *ex parte* proceedings on the other side are admitted; or I am willing under the strong averments that have been made

of threats and undue influence, and also as to the solvency of the estate, to give further time to reply to the act or petition, and to bring affidavits in support of the averments: but if I do this, it is at the risk of costs which I shall certainly give against them if their averments are not proved.

Dodson elected to have further time to reply to the act.

Per Curiam.

I expect not merely a general denial of the insolvency, but a specific statement of the assets; the debt is asserted on the other side to be upwards of 700*l.*, and the assets not to amount to more than 170*l.* It is to be remembered that the party may involve herself in costs, though the question of right may be in her favour.

The cause came on for hearing on the act on petition, and the affidavits which had been adduced in support of it. On the part of Mrs. Willby, it was alleged that she had executed the proxy of renunciation under threats and intimidations;—that by law she had a right to retract a proxy of renunciation at any time before the administration passed the seal;—that the estate was not insolvent;—that William West and Joseph Smith took means for turning the deceased's family out of the house, by getting possession of the license, and advertising an immediate sale of the effects;—and that in order to prevent the ruinous consequences to the deceased's children from such proceedings, and in compliance with the wishes of several of the creditors, Thomas Wade and Richard Burton had obtained letters of administration from the proper Court within the diocese of Peterborough.

These facts were all contradicted by the creditors, except the circumstance of Wade and Burton having obtained the letters of administration from the Court at Northampton; in answer to which it was stated that they were neither of them creditors of the deceased, and that at the time they obtained the said letters of administration they knew that the deceased had left bona notabilia to found the jurisdiction of the Prerogative Court of Canterbury.

Phillimore, for the creditors.

Dodson contra.

JUDGMENT.

SIR JOHN NICHOLL.

The facts of this case have been set forth in an act on petition, in which it is alleged that William Sampton died on the 18th of August insolvent; that West and Smith are creditors; that his widow died on the 15th of August, that his children are minors; that the minors elected Elizabeth Willby for their guardian for the purpose of renouncing the administration—she accordingly executed a proxy of renunciation. West and Smith were sworn administrators, and gave bond. On these grounds they pray the administration may pass the Seal. Application was made to hear this case *ex parte* on account of the delay on the other side—and that application was acceded to: but upon its being stated that new proxies were executed by the minors to re-appoint their grandmother, that she was ready to act, that her renunciation had been obtained by threats and intimidations, that the estate was solvent, permission was given them to answer the act or petition. To this a reply was put in by the other parties contradicting all the material averments. This is the general substance of the statement of facts.—

The *first* question is, whether a renunciation once made may be retracted before the administration has passed the Seal, and I am of opinion that it may.

The next question is whether the Court is bound to allow it to be retracted; and I am of opinion that this depends upon the circumstances of the case.—Mrs. Willby does not come here to claim in her own right, but as appointed by the next of kin.—She only claims the administration *durante minoritate*;—she is not within the statute;—it has been so laid down in a variety of cases;—the same rule has been laid down in Courts of Westminster Hall, *King v. Bettesworth*, 2 Strange 956. There are instances within my own memory where the Court has granted to persons not guardians of the minors the administration, and refused to grant it to the person nominated by them. In *Lovell and Brady v. Cox*, Lovell and Brady were appointed trustees by the deceased, and his heir Anne Cox was executrix and residuary legatee. She was a minor; the father claimed the administration *pendente minoritate*. The Court expressly held it had a discretionary power, refused it to him, and gave it to the trustees, the parties in the cause.

There is an old case *Hawksworth and Simpson v. Warner*, Prerog. 1731, which more directly falls under the circumstances of this case. My note says, “Wilkinson was the deceased; he left a brother a minor and his next of kin.—Warner was the deceased’s brother by the half blood; and he applied in this case to be joined with the minor, and to take administration with him of the effects of the deceased; administration however was granted to the creditors, because the estate was not sufficient to pay the debts due from it. So the administration *durante minoritate* may be granted to creditors in exclusion of the guardian of the minor, if the estate be insufficient to pay the debts according to this decision in 1731. It has been laid down in other cases that this Court is not bound by the choice of the minor: but that the administration may be given away from the person so chosen.

I recollect a case of *Lewer v. Lewer*, Prerog. 1792, where administration was contested between the father’s brother, and the mother’s brother, and in which the Court held it was not bound by the choice of the minor.

The choice of the minors would have no great weight here as the eldest of them is not *fourteen*.—If he was near of age, it would be otherwise: when the case is out of the statute, and the Court is called upon to exercise its discretion, its leaning is to guide itself by the interest in the property, and it is desirous of granting the administration to that person who is most likely to dispose of the property to advantage.

Where the next of kin has no interest in the property, he is by the spirit, though contrary to the letter, of the act excluded;—where there is a residuary legatee, he excludes the next of kin.—If the residuary legatee declines, it is usual to grant it to the next of kin: but there have been cases where the Court, considering the next of kin excluded, has granted it to the creditors. In *Furlonger v. Cox and Others*, Prerog. Jan. 8, 1811, the deceased left a widow and a son;—the widow was sole executrix and universal legatee.—She renounced probate, and the son contended for the administration against a creditor.—The Court held that the son was excluded, and the estate being insolvent gave the administration preferably to the creditor.—There is an old case before the Delegates, *Bridges v. The Duke of Newcastle*, Deleg. 1712.—Lord

Hollis died: Bridges claimed administration as next of kin. The effects were vested by Act of Parliament in the Duke of Newcastle to pay the debts of the deceased. Sir Charles Hedges, Judge of the Prerogative Court, first, and afterwards the Delegates, held that the next of kin was excluded, and granted the administration to the Duke of Newcastle.

The principle is clear that the next of kin, when he has no interest, may be excluded, and the administration be granted to a person who has an interest in the effects.

That, however, is not the question of the present case: the party before the Court is not the next of kin, but a relation of the next of kin claiming during the minority.—The guardian has once renounced, a circumstance pretty strong to show that the creditors are interested. They have entered into the bond, and given the usual securities; and yet this old woman upwards of *seventy* is brought forward to desire the administration may be granted to her.—I very much agree with what was said by Lord Mansfield in the *Archbishop of Canterbury v. House*, Cowper, 140, “that no next of kin ever wished for the administration of an insolvent estate for honest purposes.” A long act of Court has been gone into alleging threats, intimidation, and that the estate is solvent;—affidavits have been made. It is not necessary to wade minutely through all these affidavits: but let us look who are the parties. On one side only this old woman aided by Elizabeth Barton, the daughter of a pretty active person in this business. She (Elizabeth Barton) was only present on the 31st of August: but was not present on the 28th.—Why have not Mr. Wade and Mr. Barton, and Doughton their solicitor, come forward to state the condition of this estate? These persons I consider to be the real parties to this transaction, not the grandmother. On the other side there are the affidavits of all the creditors stating the amount of the property, and the insolvency of the estate, in which they are joined by Mr. Shuttleworth, the deceased’s own solicitor. They give the history of all that passed; and they are supported by an extract from the registry of the Court at Peterborough, and by an affidavit of the clergyman of the parish.

The deceased kept a small public house which was his own freehold: but it was mortgaged to its utmost amount, or nearly so. A meeting of the creditors took place on the 28th of August. And I agree that dates are most material in this case—it was settled at this meeting that the administration should be granted to West and Smith and Wade: but Mr. Shuttleworth the solicitor then expressed his doubts whether Wade, not being a creditor, could be joined in it. In consequence of there being bona notabilia, Shuttleworth writes to his proctor here to obtain a proper instrument. On the 31st of August the proxies of renunciation are signed. On the 1st of September a commission issues to swear the creditors on the 2d of September; they are sworn, and the bond is executed. What do Wade and Barton in the mean time? They go to the Court of the diocese of Peterborough, and obtain an administration on the 30th of August on curious averments. If the administration oath was properly administered, they must have taken it under an extraordinary loose, and utterly false averment. *Cousins and next of kin* are stated to renounce the administration; they must therefore have sworn then that the deceased died without children; and really I feel a good deal of surprise that parties should venture to

come before this Court after such conduct—this is within *twelve* days after the deceased's death; and yet it has been observed in argument, that the other parties were to blame for making preparations, to take out the administration in this Court after *fourteen* days, his own administration being thus clandestinely and secretly snapped up. The obtaining the administration thus, throws a colour upon the whole case. I must take the facts as stated by the creditors and their solicitor to be correct against the old woman and Barton's daughter.

Mrs. Willby sets forth at the close of her affidavit, "*That if the administration should be granted to her, the relations and friends of the deceased will come forward, and raise such a sum of money as will be necessary to pay off the whole of the debts owing by the said deceased, even if the estate of the deceased should be insufficient for that purpose.*" The other party has very much to regret, that the relations and friends did not come forward in this mode. They would readily have consented to the grant; but Mrs. Willby herself states to the clergyman of the parish that she cannot undertake the conduct and management of the business; and the clergyman and creditors set on foot a subscription for the maintenance of the children which they abandoned on account of the interference of Mr. Willby, Wade and Barton, in the affairs of the deceased.

How stands the fact of the solvency of the estate? According to the account given by Mrs. Willby with all the assistance of Mr. Douglas, the debts amount to 279*l.* and the personal effects to 205*l.* Upon her own statement the estate is insolvent one fifth;—she throws in the value of the real property;—but this Court has nothing to do with that, the administrator cannot dispose of that. There may indeed be special cases in which the creditor under certain circumstances may get at the freehold property: but all this Court enquires into is the solvency of the personal estate. Besides I have no other constat as to the value of the real estate but the statement of this old woman, and her affidavit was not made till the 8th of December, when the other party had no opportunity of replying. There is however a mortgage on it, amounting with the interest to 492*l.* This probably is the total value—the mortgage *prima facie* is a charge on the personalty before the realty; and the heir will have a right, if he can, to have his property exonerated from it; more especially if, as is generally the case, a bond or other collateral security has been given. Upon her own statement therefore the estate is insolvent. I cannot hesitate in so holding it. And I am still more decidedly of this opinion, when I look at the affidavits on the other side on which I place more reliance. Without therefore deciding whether a next of kin may retract an administration before it passes the Seal;—without deciding whether at any time, *durante minoritate*, a creditor may not contest for that administration; still I am of opinion, looking at all the circumstances of this case, seeing that there has been a renunciation formally made, that the estate is insolvent, that the minors are very young, and that this woman is quite unfit to carry on the business for their interest and benefit;—I am of opinion that I ought to grant this administration during their minority to the creditors. They have an interest in managing the property to the best advantage, and they must account hereafter for the monies they receive and expend.—Moreover if they have the administration, the other creditors may come in and prove their debts so as perhaps to secure the payment of

them all pro rata at some future time. Whereas if the next of kin should possess the grant, he may have no interest in discharging their claims, or he may give a very unfair preference among the creditors.—I shall grant the administration to the creditors.

On costs being pressed.

Per Curiam.

I think, under all the circumstances, I am bound to give costs.

ARCHES COURT OF CANTERBURY.

REES v. REES.—p. 387.

(An appeal from the Consistory Court of Bristol.)

3 E. 2. R. 153-4.

Gann's Ch. Rep. 92. Allotment of alimony, pending suit.

On the 16th of January, 1816, Ann Catherine Rees took out a citation against John Rees her husband in a cause of divorce by reason of adultery.

On the 31st of August 1816, she brought in a libel, consisting of *twelve* articles; and many witnesses were examined in support of it.

On the 3d of January 1818, an allegation of faculties was given, in which the freehold property of the husband was estimated at 1800*l.* per annum.

The husband in his answer to this allegation deposed that his landed estate did not produce a net income of more than 1015*l.* 19*s.* 10*d.* per annum;—that by a deed dated the 17th of June 1817, for the payment of debts amounting to 3000*l.*, he secured the annual payment of 350*l.*; that by another deed of annuity dated the 25th of March 1812, he secured 190*l.* out of his estates to other persons, and consequently that he had remaining only the sum of 475*l.* 12*s.* 10*d.* for the support and maintenance of himself and of several infant children;—and that his wife was entitled to the interest of a certain legacy amounting to 6700*l.* bequeathed to her for her life, by the will of her father, which produces the sum of 335*l.* annually.

Arnold and Daubeney for the appellant.

Swabey and Jenner contra.

JUDGMENT.

Sir JOHN NICHOLL.

This is an appeal from the Consistory Court of Bristol, where it was originally a suit brought by the wife against the husband for a separation by reason of adultery. This appeal is from a grievance; that grievance is the allotment of alimony; it is contended that there should have been no allotment.

It has been truly stated that there is no fixed rule as to alimony;—it is in the discretion of the Court, and that discretion is to be formed from an equitable view of all the circumstances of the case.

Though at the commencement of a suit I cannot take the charge made against the husband as proved, yet it gives a complexion to the case.

It is perpetually stated against a wife who is proceeded against by

her husband for adultery, that though the Court cannot assume her guilty of the offence till it has been proved, still that it is a sort of charge which ought to make her content to live in decent retirement.—On that account a comparatively small allotment is given during the pendency of the suit.—So on the other hand where the wife brings the suit, and is the complainant, where there is no complaint against her, and that not in a suit of cruelty, which frequently turns out a complication of equivocal facts where there are faults on both sides: but here is a continued course of gross and profligate adultery. And I agree with Dr. Jenner, that I must look at the complexion of the case.—The parties were married in 1803—they lived together till 1814—they had a large family, there are seven children living.—A young woman is admitted as governess in the family, with whom the husband is charged to have formed an adulterous intercourse; and to have deserted the residence of his wife and family; and to have cohabited with at various lodgings, under various names, in the city of Bristol till this suit commenced.

This is the complexion of the charge;—the suit has been pending for four years—treaties of compromise have been entered into, and no blame can be attached to the wife, the mother of *seven* children, for having listened to proposals of compromise.—But what is the conduct of the husband? No defensive allegation has been given in on his part—the suit has been going on for *four* years. If the charge was completely unfounded, hardly a Court day would have been suffered to elapse before the injured husband would have met it.

It is quite impossible to lay out of my consideration the general tenor of the charge.

It appears from the allotment of the alimony that there was some delay on the part of the wife, and that she did not apply for it till some time after the suit had commenced.

The allegation of faculties states, that the husband possessed landed property to the amount of 1800*l.* per annum;—his answers deny this, but admit the net produce of his estate to be 1015*l.* 19*s.* 10*d.*, and deny that he has any other property.—As the Court has no certain proportion which it allots, a very minute examination of the income is not necessary:—but the Court will presume the husband, who alone makes the statement, to have made every possible deduction in his own favour. Out of 1015*l.*, he claims a deduction for debts—and states that he has granted annuities to the amount of 540*l.*: but the last and most considerable part of this deduction is for an annuity granted during this suit, *one* year after it had commenced, and *three* years after the adultery has been charged. If the husband living in public adultery incurs debts and grants annuities to pay them, this is not a deduction he is entitled to make.—The utmost the Court could allow would be the interest of the debt; and even then the husband should satisfy the Court that the debt was contracted before the injury was done. Where the party himself has the benefit of being heard on his own statements, he should set forth every thing fully, or the Court will take the statement to his disadvantage.

It has been pressed that he has the maintenance of seven children.—I wish that fact had been more fully stated in his answers;—it is highly improbable that he has during this suit, or that he is likely hereafter to have, the sole maintenance of them. I am aware that the obligation of

maintaining them lies on the husband, and I shall not take this part of the subject into much consideration.

The wife has a separate income of 350*l.* per annum for her life; if she had not had this property, I think the Court below would have been called upon to grant her more than 100*l.*

I know no such rule as that stated that the Court usually grants one-sixth;—the general proportion of alimony is much higher than has been stated.

The Court of Appeal is always unwilling, except a decree is manifestly wrong in point of principle or extent, to disturb a sentence: but, considering that the wife was two years before she applied for alimony, I shall be disposed not to carry the grant back to the return of the citation, but shall make it merely prospective. The wife must be put to additional expenses in the conduct of the suit beyond those which will be allowed upon taxation.

I think the wife is entitled to 100*l.* per annum additional to her separate income; and, under all the circumstances, it is fair and equitable to reverse that part of the sentence which directed the 100*l.* alimony to be paid from the return of the citation: but I shall direct it to be paid from the date of the decree.

There has been great delay. I wish that in the future proceedings all possible expedition should be used; and it should be understood generally by the registrars in the Courts below, that if they do not enforce the process of this Court, this Court will take means to compel them to do so.

HIGH COURT OF DELEGATES.

TEMPLE v. WALKER.—p. 394.

An Appeal from the Prerogative Court of York.

An allegation, pleading the will of a married woman, ordered to be reformed.

THE Delegates who sate under this commission were,—

Mr. Baron GRAHAM,	Doctor JENNER,
Mr. Justice BAYLEY,	Doctor DAUBENY,
Mr. Justice PARK,	Doctor PHILLIMORE, and
Doctor ARNOLD,	Doctor GOSTLING.

The cause commenced in the Prerogative Court of York, by a citation taken out on the part of John Walker the younger, the sole executor named in the will of Sarah Walker, citing Richard Temple, doctor of physic, as the lawful husband of the deceased, to appear and show cause why probate should not be granted to him of the said will. An appearance was given for the party cited, who alleged himself to be the husband of Sarah Temple, and as such entitled to the administration of her personal estate and effects; and prayed administration accordingly. An allegation was given on the part of the executor,—which pleaded,

1st, That the said Sarah Temple, the party in this cause deceased,

was the natural and lawful and only child of Thomas Stockdale, wine-merchant, and Sarah his wife, and afterwards his widow, late of Scarborough aforesaid, both now deceased; and in or about the month of December, in the year of our Lord 1787, was lawfully married in the parish church of Scarborough aforesaid, to the said Richard Temple, the other party in this cause, and that this was and is true, public, and notorious, and so much the said Richard Temple doth know or hath heard, and in his conscience believes and hath confessed to be true; and the party proponent doth allege and propound of any other time and times, and every thing in this and the subsequent articles of this allegation contained, jointly and severally.

2d, That the said Sarah Temple and Richard Temple, from and immediately after their said marriage, mentioned in the next preceding article, lived and cohabited together as lawful husband and wife, at Scarborough aforesaid, until in or about the month of October, in the year of our Lord 1789, *when the said Richard Temple did of his own accord forsake the said Sarah Temple his wife, and depart from his residence at Scarborough aforesaid; that* in consequence thereof, and of many unhappy disputes and differences then existing between them the said Richard Temple and Sarah Temple, they mutually agreed to live separate and apart for the remainder of their joint lives. And the party proponent doth further allege and propound, that in and by a certain indenture or deed of separation, bearing date the sixth day of July, in the year of our Lord 1790, and made, or mentioned to be made between the said Richard Temple, then or late of Scarborough aforesaid, and the said Sarah Temple his wife, late Sarah Stockdale, spinster, the only child and heiress at law, and also next of kin of Thomas Stockdale, late of Scarborough aforesaid, wine-merchant, deceased, of the one part, and Sarah Stockdale of Scarborough aforesaid, widow and relict, and also administratrix of the goods, chattels and credits of the said Thomas Stockdale deceased, and mother of the said Sarah Temple and John Walker, of Malton in the said county of York, merchant, of the other part, the said Richard Temple did absolutely grant, bargain, sell, assign, transfer, and set over unto the said Sarah Stockdale and John Walker, their executors, administrators, and assigns, for the considerations therein mentioned, certain household furniture, monies, funds and securities, goods and other personal estate, effects and premises therein mentioned, in trust, for the sole and separate use, benefit, advantage and disposal of the said Sarah Temple during her life, whether married or sole, and as if she was unmarried; and from and after the decease of the said Sarah Temple as to what should remain of the said furniture, monies, funds, and securities, goods and other personal estate, effects and premises, unapplied or undisposed of as aforesaid, upon trust that they the said Sarah Stockdale and John Walker, and the survivor of them, her or his executors, administrators or assigns, should assign, transfer, pay, release, or otherwise dispose of the same respectively, to such person or persons, for such intents and purposes, and in such manner as she the said Sarah Temple, whether married or sole, as if she were unmarried, by any deed or writing under her hand and seal, or otherwise, should, notwithstanding her coverture, order, direct, or appoint, and in default of and until such order, direction or appointment should be made: and as to such part or parts of the said trust premises as should from time to time remain undisposed of, under the trusts aforesaid, upon trust that they

the said trustees should assign, transfer, pay, apply and dispose of the same to such person or persons, and in such manner and form, as she the said Sarah Temple, by her last will and testament, or any writing in the nature thereof, or any codicil thereto, should, notwithstanding her coverture, give, devise, bequeath, order, direct, limit, or appoint; and this was and is true, public, and notorious, and so much the said Richard Temple doth know or hath heard, and in his conscience believes, and hath confessed to be true; and the party proponent doth allege and propound as before.

3d, That the said Sarah Temple, the testatrix in this case, deceased, being of sound and disposing mind, memory and understanding, and not having previously by her deed or writing disposed of the monies, funds, and securities, and premises by the said indenture submitted to her disposal and appointment, but having an intent and purpose to make her last will and testament in writing, or a writing purporting to be and in the nature of her last will and testament, and thereby to dispose of all the property, estate and effects, of which she had a disposing power, under and by virtue of the said indenture, by virtue and in execution of the powers and authorities mentioned and recited in the said indenture, and of every other right, power, or authority enabling her thereunto, did give directions and instructions for making and drawing thereof; and pursuant to such directions and instructions the very will or testamentary writing now pleaded and exhibited was drawn up and reduced into writing, in the very manner and form as the same now appears: and after the same was drawn up and reduced into writing, the same was audibly and distinctly read over to or by the said testatrix, who well knew and understood the contents thereof, and liked and approved of the same; and in testimony of such her good liking and approbation thereof, she the said testatrix did, on or about the 21st day of April, in the year of our Lord 1817, being the day of the date thereof, set and subscribe her name at the foot or bottom of the thirteen first sheets of the said will or testamentary writing, and at the foot or bottom of the fourteenth or last sheet thereof did set and subscribe her name and affix her seal in the manner and form as the same now appears thereon; and did publish and declare the same as and for her last will and testament, in the presence of several credible witnesses, who, at her request, in her presence, and also in the presence of each other, did then also set and subscribe their names as witnesses thereto, in the manner and form as now appears thereon; and she the said testatrix of such her last will and testament, or testamentary writing, did nominate, constitute, and appoint the said John Walker the younger, sole executor, and did give, will, and bequeath, dispose, and do in all things as in the said last will and testament or testamentary writing is contained; and she the said testatrix was, at and during all and singular the premises, of sound and perfect mind, memory, and understanding, and talked and discoursed rationally and sensibly, and well knew and understood what she then said and did, and was capable of making a will, or of doing any other serious or rational act of that or the like nature; and this was and is true, public, and notorious, and so much the said Richard Temple doth know or hath heard, and in his conscience believes, and hath confessed to be true; and the party proponent doth allege and propound as before.

This allegation had been admitted in the Court below; and from that sentence the present appeal was interposed.

Dr. Adams in opposition to the sentence of the Court at York.

Unless the general law is controuled, the husband has a right to the administration. There are two modes by which a married woman may acquire a right to dispose of property; one, by settlement made anterior to marriage; the other, by an agreement subsequent to marriage, through the medium of trustees: the latter is the more questionable mode. It should seem from the will which is propounded, that certain property is mentioned as at the disposal of the wife without the value of it being set out: it is limited not only to certain personal property, but to consist only of what shall remain of this property.

Per Curiam, Mr. Justice Bayley.

I take it for granted, that when a will is made by a femme coverte under a power, the usual course is to give a probate limited according to the power.

Per Curiam, Dr. Arnold.

The Court understood you to object, that the deeds recited are not pleaded in the allegation and exhibited.

Dr. Adams.

Certainly that is one objection:—this seems a novel experiment, to prove by parol the contents of a written instrument.

This allegation is not capable of being reformed: to allow them to reform it now would be to make a case for them.

The Court stopped the argument, and directed the counsel on the other side to state why the deeds alluded to in the allegation were not exhibited.

Dr. Lushington and Mr. Parke were on the same side with Dr. Adams.

Sir Christopher Robinson (K. A.) in support of the sentence.

The real question is whether the power shall be exhibited in this Court, or in another stage of this cause. In our practice it is not necessary to introduce such a deed in an allegation; it may be taken to exist by admission of the opposite parties. In *Richard v. Meade*, Prerog. 1805, where Mrs. Shave the testatrix had a separate property, the deed by which she had a power of disposing of it was not pleaded in the allegation; the settlement there was brought in, in a later stage of the proceedings, upon an assignation on the adverse proctor.

Per Curiam, Mr. Justice Bayley.

Is it not much more obvious that the party who claims under a particular document should himself exhibit that document?

Sir Christopher Robinson.

The executor may not have the instrument; it may not be in his power to exhibit it; he may be himself a party to it.

Per Curiam, Mr. Baron Graham.

Prima facie a married woman has no title to make a will. If she claims a right, she must at least show her title, because such a right is contrary to the general tenor of the law.

Sir Christopher Robinson.

He may not be able.

Per Curiam, Mr. Justice Bayley.

Then you must plead that it is not in your power; such at least would be our course.

Sir Christopher Robinson.

The course of our Courts was different in Mrs. Shave's case; and if a case justifies the distinction, it surely is the present.

Some authorities of the Courts of common law are in favour of a contrary course; it is laid down that a defendant shall not have oyer of a record when he is a party to it.

Per Curiam, Mr. Justice Bayley.

We never have oyer of a record now.

Sir Christopher Robinson.

Still on the broad challenge between other cases and the present; suppose it essential that the instrument should appear good to the Judge, or essential as to the other parties. If this was not an original cause, I should not think it of much importance to resist it: but here on an appeal the Court would not press lightly on forms of jurisdiction.

On the authority of *Mrs. Shave's* case, we contend that we are not bound to plead the deed.

Swabey, on the same side.

Contracts of this nature have frequently received the sanction of the Ecclesiastical Courts when entered into after marriage.

Per Curiam, Mr. Justice Bayley.

But the question is, whether that point is ripe for discussion;—we are not likely to give an extrajudicial opinion upon it.

Dr. Swabey.

Clouds v. Robinson, Prerog. and *Copeland v. Pedder*, Prerog., were both cases in which the power was granted subsequent to marriage; and both the wills were established by Sir George Hay.

Mr. Tindal on the same side.

JUDGMENT.

Per Curiam, Dr. Arnold.

The Court is of opinion that the allegation must be reformed for the purpose of allowing the party to plead the power under which the will was made. With the concurrence of the rest of the Court, I state also that we think it proper to omit the following words in the third article of the allegation, *viz. When the said Richard Temple did of his own accord forsake the said Sarah Temple his wife, and depart from his residence at Scarborough aforesaid.* We think these words may tend to the introduction of extraneous matter, and lead to evidence which cannot affect the question before the Court in this allegation.

The Court reversed the sentence of the Prerogative Court of York, retained the principal cause, and directed the allegation to be reformed.

The allegation was brought in reformed according to the directions of the Court.

Before the Condelegates, *Dr. Arnold*, *Dr. Jenner*, *Dr. Daubeny*, *Dr. Phillimore*, and *Dr. Gastling*.

Moore, proctor for Richard Temple the defendant, declared that he did not further oppose the will of Sarah Temple, the party in this cause deceased; and prayed the Judge to decree the expenses of his party, the appellant, to be paid out of the estate of the said deceased, and to dismiss her party from this appeal. Present *Toller* (proctor to the respondent), objecting thereto. The Condelegates having heard counsel on both sides, rejected the prayer made by *Moore*, and assigned him to give in his client's answers on the by-day.

Richard Temple gave in his personal answers.

The Delegates pronounced for the force and validity of the last will and testament of Sarah Temple, bearing date the 21st of April, 1817, propounded in this cause; and decreed that letters of administration, with the will annexed, of all and singular the goods, chattels, and credits of the said Sarah Temple to John Walker the younger, present *Moore*, on behalf of Richard Temple the husband consenting thereto.

The Judges moreover decreed the expenses(a) of the said Richard Temple to be paid out of the estate of the party deceased.

(a) The property disposed of by the will amounted to nearly 50,000*l.* Out of this an annuity of 50*l.* per annum was bequeathed to her husband.

PREROGATIVE COURT OF CANTERBURY.

FINUCANE v. GAYFERE.—p. 405.

Probate of an imperfect codicil which had been granted in 1807, revoked.

ELIZABETH GORDON, of Percy-street, London, died a widow in July 1807. On the 30th of October of the same year probate of a will, and two codicils, disposing of property to the amount of 90,000*l.*, was granted to Thomas Gayfere and the Rev. Harry Welstead, the executors. On the 20th of October 1820, the probate of the second of the two codicils was called in by Maria Finucane, widow, one of the substituted residuary legatees named in the will; and Thomas Gayfere, the only surviving executor, was cited to show cause why the probate should not be revoked, and the codicil be pronounced null and void.

On the 15th of November following, the executor brought in an allegation propounding the second codicil, and pleading that “the deceased, having an intention to alter the disposition of property, as contained in her last will and testament, and the first codicil thereto, and more particularly with respect to the bequest of the residue of her estate and effects by her said will; did some time subsequent to the 28th of June, 1806, being the date of her first codicil, with her own hand prepare and write the aforesaid second codicil, with its several obliterations and interlineations;—that the whole body and contents of the instrument were of her own proper handwriting;—and that on the 28th of July, 1807, being four days after the death of the deceased, this second codicil, and also the aforesaid will and testament and the first codicil, were found locked up in a mahogany box, in which the deceased was accustomed to keep her papers of moment and concern.”

The codicil (a) propounded was as follows:—

“I wish to revoke the fifty pounds to Michel Anglo Taylor, having by the codicil given him a ring bequeath in this will, to the late George Richard, esquire, dease. And I also revoke the give of the residue of my propreity real and personal to James Gordon, son of the late James and Mary Gordon of Rochester; and in the stead thereof, I give to the said James Gordon the sum of one hundred pounds as a legacy at my decease, and the sum of one hundred pounds a year during his natural life; and then the residue of my estates real and personal, to be equally

(a) There were many erasures and interlineations in the paper.

divided between the children of the said James Gordon, Henry, George, and Maria Finucane, brothers and sister to the aforesaid James Gordon, son of the late James and Mary Gordon of Rochester, and to the children of Mary Payler, daughter of the late George and Ann Gordon of Rochester, decease, the children of John Wathen, grandson to the aforesaid John Wathen, late of Catherine Court, decease, and the children of Eliza Wathen, grand-daughter of the said John Wathen decease. To the children of Phebe Smith, daughter of Francis and Mary Smith, of New Building, Yorkshire. To the children of Kathre Harman, and Mary Southam, grand-daughter to Eliza Bellew, decease, in equal division, to and amongst such child or children equally divided. Power to the trustees to advance what they may think proper to any of them for education, or to apprentice to such situation as might be proper to place them in a way to provide for themselves, and as they may die, their share become as part of the residue, and to be equally defted to any among the survivors equally as their share, if they do not live to the age of twenty-one years; and I also give and bequeath to my servant Eliza Norton five pounds a year during her natural life. I also give to the parish of Shorne and to *Allowes Barley*, Tower-street, each one hundred pounds, the interest of it to be laid out in coals or bread, in such manner as the churchwardens for the time being shall think most for the poor persons of the said parish; and fifty pounds I give and bequeath to the City of London Lying-Inn-Hospital.

And Thomas Gordon Ansell. I also wish to give to Hannah Beesley, above what she is entitled to by the codicil of my will, twenty pounds for mourning.

Lushington and Dodson in opposition to the allegation, referred to *Satterthwaite v. Satterthwaite*, ante, 351.

Swabey and Jenner in support of the codicil. •

JUDGMENT.

SIR JOHN NICHOLL.

Probate of the will and two codicils was granted by this Court in 1807; probate of the second codicil is now called in by a person who is a substituted residuary legatee; her right devolved upon her, it is stated, in the year 1816; since that time the property has been in the Court of Chancery.

Certainly the application comes at a late period to revoke such an instrument: but time alone is no absolute bar to it.—It has been said, that being brought forward at so late a period, the Court will be contented with slighter proof. This observation is well founded to a certain extent; but still there must be that degree of proof which would bring the case within the rules of the Court; at the same time the executor is not to be protected, if he has proceeded in the first instance, in a manner in which he was not warranted.

I must decide this case upon ordinary principles; and, if so, I can entertain no doubt respecting it. It is pleaded that the deceased died in July 1807; that, intending to alter her will and codicil subsequent to June 1806, she wrote the codicil in question; and that at her death the three instruments were found together in her mahogany writing desk.—These are all the circumstances pleaded. There is nothing that fixes it at so short a time before her death, that she can be supposed to have been struck with death in the very act of writing this paper. The date cannot be fixed at a later period than the last year of her life:—there is

nothing to show that she was prevented from finishing it by the intervention of death, and not completing the instrument, the presumption of law is, that she abandoned the intention.

If there was nothing to prevent her from finishing this paper, the question then comes to this, whether it can be considered as a finished paper; whether she intended it to operate in this form, and to do nothing more to it.

I am therefore to consider, whether it is possible that the deceased could have considered this as a finished paper? She had executed a formal will in 1801, drawn up by her solicitor—the bulk of her property was real property.—Upon the last sheet of that will, she had subsequently a codicil regularly and formally drawn up. This also was signed by herself, sealed, and attested by three witnesses; and is dated in June 1816.

The present paper is all in her own hand-writing: it begins, “I wish.” It has a variety of interlineations and erasures, no date, no signature, no concluding words; it ends with a legacy of 20*l.* to a servant for mourning;—there is nothing like a conclusion. It seems particularly intended for the disposition of the residue:—she also makes a new disposition of her real as well as personal property; I cannot doubt that she intended to have a regular instrument drawn and executed in the same manner that she had executed her will and the other codicil, and did not consider this paper as finished or operative.

I must therefore reject this allegation.

REDMILL and REDMILL v. REDMILL.—p. 410.

When there is no party before the Court who has an interest in supporting a testamentary paper propounded, the Court will require the appearance of such a party.

ROBERT REDMILL, C. B. a captain in the Royal Navy, died on the 19th of February 1819. A will and codicil bearing date respectively on the 12th and 15th of February 1819, were propounded in an allegation by the residuary legatees named in the will, as to one moiety of the deceased's estate and effects; and were opposed by Susanna Redmill the widow of the deceased, who cross-examined the witnesses examined on the part of the residuary legatees, and gave a responsive allegation, but produced no witnesses in proof of it, and took no copies of the evidence. In the course of the proceedings the residuary legatees as to the other moiety of the estate, intervened and opposed the codicil, and cross-examined one of the witnesses produced on the allegation given in by the other residuary legatees.

The cause stood for hearing.

Per Curiam:

A difficulty strikes me as to the want of proper parties before the Court—there is no person before the Court who has an interest in supporting the paper—two parties are here both interested to get rid of it; there are, I think, considerable doubts as to the validity of the codicil, but all the parties interested should be called before the Court either by notice or by formal process;—it does not appear from the proceedings that any party has had notice; how am I to pronounce against the

codicil, when I find there is no person before me interested to support it.

The will is most clearly proved, and it excludes the widow;—the more clearly the will is proved, the more doubt is thrown on the codicil. The wife abandons her opposition;—the residuary legatees are in fact the next of kin. The cause cannot proceed till some party interested to maintain it is before the Court—it would be a strong thing for a party having propounded a codicil to take probate of a will without it.

Let the question stand over for the consideration of the parties and their counsel.

BATES and Others v. GITTENS.—p. 412.

A party is not precluded from proving himself to be the husband of the same person whose will he had propounded in a former suit as executor and residuary legatee.

JOHN COX GITTENS applied for probate of the will of Elizabeth Cox Gittens, *widow*, as the executor and residuary legatee. The usual proceedings were had. Proxies and affidavits of scripts were brought in from each party; and Austen (Proctor) on behalf of John Cox Gittens declared he propounded the will, and asserted an allegation. On the 15th of November, this allegation not having been brought in, Townsend (Proctor) prayed the Judge to decree letters of administration to the next of kin, unless the allegation was brought in on the next Court. On the 23d of November, Austen alleged that John Cox Gittens was as well the lawful husband of the deceased as the executor named in her will; and therefore denied that the other parties had any interest in the goods of the deceased, or were competent in law to call upon the executor to propound the will, and declared he was ready to propound the interest of the husband if it should be denied—but the allegation not having been brought in as assigned, the Court decreed the administration to the other parties.

Before the administration passed the seal, a caveat was entered against it—this caveat was warned and objection was taken on the ground that the parties had already been before the Court, and that the Court had decided between them. To this it was replied that this was an entire new suit, and that it was competent for John Cox Gittens to prove himself the husband of the deceased, which must of necessity exclude all other interests.

Per Curiam.

I must consider this to be a new suit, and that I cannot preclude the party from proving himself to be the husband to the deceased.

EVANS v. KNIGHT and MOORE.—p. 413.

A responsive allegation, materially reformed.

LYNCH v. BELLEW and FALLON.—p. 424.

The same will may contain the appointment of one executor for general, and of another for limited, purposes.

HENRY LYNCH, a merchant, died in May, 1820, in the city of Cadiz where he resided, leaving considerable property both in Spain and England: his personalty in this country was stated at 30,000*l.* in the funds, and 8000*l.* due to him from certain merchants and bankers in London.

His will was formally executed on the 11th of December, 1819, in the presence of a Spanish notary at Cadiz;—and a question arose upon it, as to the appointment of the executors. The will was divided into several clauses: those which bore upon the question at issue were the following,—

“I order that when my death shall take place, my body shall be ecclesiastically buried with the shroud, funeral apparatus, and masses that shall be deemed fit by my testamentary executors.

“I do moreover order that the said funds in England, or the lands that may be therewith purchased, should that take place, may be and may be understood to be entailed, as I constitute them such; and I appoint for the possession and enjoyment thereof, in the first place the said Don Henricque Edwardo Lynch, the firstborn son of my brother Don Patricio Lynch, and of Dona Maria Blake of *Clogher House in province of Connaught and county of Mayo* in Ireland, who is to have and enjoy the entail during his life only. At his death it shall devolve to his eldest son, following the line of firstborn amongst the male children, and not female children had in lawful marriage. Should he not have any male children on the death of my said nephew, his own brother next of age shall enter into possession and enjoy his entail, and the lawful succession of the latter in like manner, so that the possessor is always to be a male. In default of sons or legal male descendants of my brother Don Patricio, the children of my sister Dona Juana Lynch De Blake, had by her marriage with Don Isidoro Blake, and their lawful descendants, shall in like manner enjoy and possess the entail, preferring the elder to the younger with the exclusion of the females, and under the condition, that the possessor shall at all times bear the surname of Lynch only. And, in default of all the abovementioned, my nearest relation shall possess the entail, always preferring the elder to the younger. And in case of there not being a male, and not otherwise, it shall devolve to the females my nearest relations, with a like preference of the elder to the younger; the possessor indispensably using whatever may be the said my surname and no other. And I *charge my said nephew* Don Henrique Edwardo, first called to the possession and enjoyment thereof, that out of the income of the said funds he may apply per annum, for the period of five years, one hundred pounds sterling therewith during the said period to attend to the good instruction of the firstborn son of his brother Don Patricio Lynch, in the event of Don Henrique not having sons; for, should he have any, he shall only employ for the aforesaid purpose thirty pounds in each of the aforesaid five years.

“I order that the debt due to me by Don Pedro Beighbeder and Company of the city of Xerez de la Frontera, after deducting what I may

bequeath therefrom in the following clauses, may be divided by my testamentary executors amongst my poor countrymen and countrywomen in real distress in this city.

“ I order that out of the property which I have *in the funds* in England no part shall be disposed of, except it be to purchase lands in the said county of Mayo in Ireland, *with the friendly aid of the house, under the firm of John William Lubbock and Co. of London* so as to guard against any imposition in the title deeds, and with the express condition, that the same is to be entailed according to the terms permitted by the laws of Ireland.

“ I appoint *as my testamentary executor* Don Henrique Fallon in the first place; and, should he not be living, Don Thomas Hemming respectively of this city, merchants, *to whom I give the power of testamentary executor*, in form for him in the fixed period of four months to conclude and terminate this commission at all events, proceeding within that time to the sale of the house possessed by me in this city at the most advantageous price which he shall hold *at the disposal and order of my heir* Don Henrique Edwardo Lynch, *as well as every thing else belonging to me.*

“ All the residue of my property, rights, and actions, after every thing hereinbefore mentioned shall have been carried into effect, I leave to my aforesaid own nephew Don Henrique Edwardo Lynch, firstborn son of my brother Don Patricio Lynch, and of Dona Maria Blake, *who is to have the rest or residue, as my heir, for such I institute* him under the obligation of paying immediately and without the least delay to my sister Dona Juana Lynch de Blake one thousand pounds sterling; and to her two sons Don Roberto and Don Juan Blake, had, in her marriage with Don Isidoro Blake, a further sum of one thousand pounds of the money to each. He shall also pay one thousand pounds sterling to Don Patricio Lynch, and one thousand pounds of like money to Don Juan Lynch, both of them my nephews, and likewise sons of the aforesaid Don Patricio Lynch and Dona Maria Blake; and I request the aforesaid Don Henrique Edwardo Lynch, my nephew and heir, to assist with his advice his two other brothers, disposing them to be careful in improving the property by me left to them, and any that they may obtain from their parents, so as not to come to indigence, as they have no other hopes or assistance than these properties and their good conduct; wherefore I recommend to them, and I hope that the same will be done by Don Henrique Edwardo, to conduct themselves well, be particular in their deportment, application, and honour for their own benefit.

“ I desire that the *debts due* to me in accounts current at the time of my death by the houses in London of John William Lubbock and Co., James Campbell and Co., and Messrs Baring, Brothers, and Co., *or any others that I may have to receive in any place whatever, may be punctually recovered by my aforesaid nephew Don Henrique Edwardo, or whoever may have his special power, or his testamentary executors, or heirs; and what shall be owing to me in Spain shall be recovered by my testamentary executor*, and the balance shall be held by him *at the disposal of my aforesaid nephew*; charging him, as I do hereby charge him *personally, if possible, to attend to the recovery of the balances in London, or any other place in England or Ireland*, so as not to fall into bad hands there, and not to take any paper not

having the responsibility of the debtors to avoid any imposition, *he being a man who is not acquainted with business*; and, upon recovery thereof, he shall forthwith make the payments of the money by me disposed in the next preceding clause; and I farther impose the obligation, that he shall likewise give to my niece Dona Eliza Lynch de Crane one hundred pounds sterling, and fifty ditto to the daughter by the last marriage of my aforesaid brother."

An act on petition was entered into on the part of Henry Edward Lynch on the one side, and Henry Fallon on the other:—on the part of the former it was alleged, that he was the nephew of the deceased, heir and residuary legatee named in the will; and also the executor according to the tenor for all personal estate and effects of the deceased, save his property in Spain; and that Henry Fallon was the executor for the will of the property of the deceased in Spain, but no further or otherwise; and accordingly prayed the Court to grant probate of the last will of the deceased, save as to the effects in Spain, to him.

On the other side it was alleged, that the testator had by his will constituted Henry Fallon general executor for all his property, whether in Spain or elsewhere; and that Henry Edward Lynch was according to the tenor of the will appointed executor limited to the sole purpose of recovering debts due to the deceased in account current at the time of his death by the houses in London, of John William Lubbock and Co., James Campbell and Co., and Messrs. Baring, Brothers, or any others that he may have to receive whatever, except in Spain; and he consented that probate so limited should be granted to Henry Edward Lynch, and that probate was prayed of the rest of the goods, chattels, and credits of the deceased within the province of Canterbury, to be granted to Henry Fallon.

Swabey and Lushington for Mr. Lynch.

Jenner and Phillimore for Mr. Fallon.

JUDGMENT.

SIR JOHN NICHOLL.

This question arises on the will of Henry Lynch—an act of petition has been entered into in which the facts stated are, that the will was executed on the 10th of December 1819, in due form, and that the testator died possessed of very considerable property.—Henry Fallon is appointed his testamentary executor, and Edward Henry Lynch his nephew his residuary legatee and heir.—On the part of the nephew it is contended, and truly so far contended, that he is an executor according to the tenor for certain purposes; and further, that Mr. Fallon is only executor for the property in Spain. On the part of Mr. Fallon it is asserted that he is an executor in England as well as in Spain, except as to the specified parts of the property which are entrusted to Mr. Lynch.

The point in dispute is, whether Mr. Lynch is entitled to a general probate, or only to a limited probate.

This depends on the construction of the will itself, for the Court is from that to collect the intention of the testator. By the *sixteenth clause he appoints Mr. Fallon testamentary executor in the first place; and, should he not be living, David Thomas Fleming respectively of this city, merchant, to whom I give the power of testamentary executor in form for him in the first period of four months, to conclude and terminate this commission; at all events proceeding within that time to the sale of the house possessed by me in this city at the most advan-*

tageous price, which he shall hold at the disposal and order of my heir Don Henrique Edwards Lynch, as well as every thing else belonging to me.

What might have been the question if he had only appointed an heir, or if he had appointed an heir and a residuary legatee, are very different considerations from this, where a person is to hold property for the benefit of the heir. This will then appoints Mr. Fallon general executor;—this would constitute him an universal executor: the appointment may be limited by other directions in the will; but they must be clear, either by express words or certain implication, to be limitations on the rights of the executor and the extent. In the subsequent parts of the will there is no express limitation; Mr. Lynch claims to be executor, according to the tenor of the will, of the property in England; he is made such by his appointment to such functions as necessarily imply that he is to act in that character; yet in a case of that sort the construction is *stricti juris*, and the intention of the testator is not to be carried beyond it.

Keeping this rule of interpretation in view,—what has he directed, and what is the course of his bequests? The will is broken up into paragraphs.

The *thirteenth* is material: it disposes of property in the funds which he values at 33,000*l.*, and orders that it should be applied to the purchase of land in Ireland by the friendly aid of Messrs. Lubbock and Co.

The *fourteenth* directs how the funds, or the lands purchased by the funds, are to be entailed: his nephew has only a life interest in them.

The *sixteenth* clause appoints a testamentary executor without any limitation as to his power.

It is material to consider that in the *seventeenth* and *eighteenth* clauses he gives his residue to his nephew after “every thing hereinbefore mentioned” has been carried into effect.—By whom? Certainly by his testamentary executor;—there is nothing to limit the testamentary executor, the residue was to go to his nephew after all was done. Is there any thing afterwards to extend the executorship to his nephew and heir? He is to collect his debts in certain places—but what has he to do with his property in the funds?—it does not seem that he can be considered generally as his executor for the property in England.—Mr. Fallon is generally executor for the property in England, Mr. Lynch to a certain extent for the property in England.

Not only is this the due course of construing the instrument: but it is perfectly natural that the testator should so have appointed it. He was willing to secure his property; and, not having a high opinion of Mr. Lynch’s habits of business, he devolved the general care of managing his property on Mr. Fallon.

Upon the whole I am of opinion that Mr. Lynch is only entitled to a limited probate as executor according to the tenor for the purposes pointed out in the *seventeenth* and *eighteenth* paragraphs of the will, and that Mr. Fallon is to be considered as the general executor.



ecutors who had obtained probate, to show cause why the probate should not be revoked on account of the residuary clause not being co-extensive with the instructions given by the party deceased.—The allegation founded on this citation rejected.

HENRIETTA Laura Pulteney, Countess of Bath (wife of the Right Hon. Sir James Pulteney, Bart.), died on the 14th of July, 1808, without issue, leaving a will dated the 5th of November, 1794, in which Sir Thomas Jones, Bart. and Christopher Codrington, Esq. and John Kipling, Esq. (a) were executors, and a codicil dated 24th July, 1805.

Sir Thomas Jones and Mr. Codrington, on the 22d of August, 1809, proved the will and codicil in the common form. On the 1st of July, 1809, a citation was taken out at the instance of Elizabeth Evelyn Fawcett (formerly Markham), the wife of John Fawcett, Esq. the substituted residuary legatee against the executors, to show cause why the probate should not be revoked on account of the residuary clause in the said will not being co-extensive with certain heads and instructions for the said will, executed by the deceased on the 3rd of August, 1794, and a new probate taken of the said will and codicil, together with that part or clause of the aforesaid heads or instructions which respects the disposal of the residue of the deceased's personal estate, as containing together the true last will and testament of the deceased.

The probate was brought in; but afterwards on the motion of counsel was delivered out of the registry to the proctor for the executors, on an undertaking in acts of Court to return the same when required, such redelivery of the probate being made without prejudice to the question at issue in the cause.

An allegation was brought in on the behalf of Mrs. Fawcett, which pleaded,—

First, That the Right Hon. Henrietta Laura Pulteney, formerly Baroness and afterwards Countess of Bath (wife of the Right Hon. Sir James Pulteney, Bart.) the party in this cause deceased, departed this life on the 14th day of July, 1808, leaving behind her the said Right Hon. Sir James Pulteney, Bart. her lawful husband, but without any issue.

Secondly, That on or about the 23rd day of July, 1794, in contemplation of a marriage which was then about to take place, between the said Henrietta Laura, then Baroness (afterwards Countess of Bath,) and the said Sir James Pulteney (then Murray,) Bart. certain articles of agreement were entered into between the said parties, whereby all the real and personal estates belonging to Lady Bath, except as therein mentioned, were agreed to be conveyed, assigned, surrendered, and transferred to Richard Lord Viscount Chetwynd, of the kingdom of Ireland, Christopher Bethell, of Swindon, in the county of York, Esq. and Osborne Markham, of Lincoln's Inn, in the county of Middlesex, Esquire, their heirs, executors, administrators and assigns, upon trust, among other things, that they should make and execute such grants, assignments, transfers, surrenders and other dispositions of the said real and personal estate, unto and to the use and for the benefit of such person and persons, and for such estate and estates and other interests, and subject to such powers, conditions, restrictions and limitations, as she the said

(a) Mr. Kipling had not acted as executor; and, after the commencement of this cause, he appeared personally in Court, and renounced the probate and execution of the will.

Lady Bath, at any time or times, and from time to time, after the solemnization of the said marriage, by any deed or deeds, writing or writings, with or without power of revocation, to be sealed and delivered by her in the presence of, and to be attested by, two or more credible witnesses, or by her last will and testament, in writing, or any writing in the nature of a will, signed by her, and attested by three or more credible witnesses, should direct, limit, or appoint, which deeds, wills, and writings, she the said Lady Bath was thereby, and by the said Sir James Pulteney, her then intended husband, empowered to make and execute as she should think fit, as if she was sole and unmarried.

Thirdly, That during the time when the articles of agreement, mentioned in the next preceding article, were in preparation, and before the execution thereof; the said Lady Bath being of sound and disposing mind, gave verbal directions to John Kipling, Esq., then and now one of the six clerks of the Court of Chancery, who acted as her legal adviser, to prepare a new will for her (in the stead of one formerly made by him for her) which she intended to execute soon after the solemnization of her said intended marriage. That, pursuant to such directions so received from the said Lady Bath, he the said John Kipling did prepare an instrument in the nature of heads or instructions for a will, to be afterwards extended in legal form, which he delivered to the said Lady Bath for her perusal and consideration a short time before the celebration of her marriage with the said Sir James Pulteney, which took place on or about the 24th day of July, 1794.

Fourthly, That after the said John Kipling had so delivered the said heads or instructions for a will to the said Lady Bath, he attended her at several different times, for the purpose of adjusting with her the heads or instructions for her will; and after the same had been adjusted, such heads or instructions were fairly copied by or by the order of the said John Kipling, it being thought expedient that the same should be signed and executed by the said Lady Bath, in consequence of her being on the eve of departure for Scotland, to remain for some months, immediately after her marriage, and before a will or testamentary appointment could conveniently be extended in legal form pursuant to such heads or instructions. That upon the last sheet of the fair copy so made of the said heads or instructions, the said John Kipling caused to be written a memorandum, in the words following, to wit, "*The above instructions contained in this and the preceding sheets have been given by me to John Kipling, Esq., in order to enable him to prepare my will or testamentary appointment in nature of a will: but as it cannot conveniently be prepared and executed before my leaving London, I do therefore publish and declare this paper writing, contained in six sheets, as and for my last will and testament, or testamentary appointment in the nature of a will, pursuant to and in execution of a power reserved to me by my marriage articles, and of all other powers in me vested, or enabling me in that behalf; and direct that it shall have the same force and effect as if a will had been executed pursuant to these instructions.*" And soon afterwards the said heads or instructions were delivered by the said John Kipling to the said Lady Bath.

Fifthly, That the said Lady Bath, after receiving the said fair copied heads or instructions for her will, as mentioned in the preceding article,

kept the same in her possession, and under her consideration for several days before she executed the same, and did with her own hand make some alterations therein. That the said Lady Bath, in her way to Scotland, paid a visit to Stokesley, in the county of York, the residence of the said Elizabeth Evelyn Fawcett, then Markham; and while there, to wit, on or about the 3d day of August, 1794, she, the said Lady Bath, being of sound and disposing mind, and having an intention to give effect to the aforesaid instrument, contained in six sheets of paper, as and for her last will and testament, or testamentary appointment, did duly sign, seal, publish and declare the same, as and for her last will and testament, or testamentary appointment, in the presence of several credible witnesses, three of whom, at her request, in her presence, and in the presence of each other, did set and subscribe their names as witnesses thereto, in manner and form as thereon now appears; and she, the said Lady Bath, did give, will, bequeath, dispose, and do, in all things as therein is contained.

Sixthly, That in supply of proof refer to a paper writing annexed to an affidavit, made in this cause by the said John Kipling, dated 29th June, 1809, now remaining in the registry of this Court; and doth allege and propound the same to be and contain the very instrument pleaded in the next preceding article as having been executed by the said Lady Bath.

Seventhly, That the said Lady Bath, after having executed the said heads or instructions for her will, in manner hereinbefore stated, did transmit the same to the said John Kipling, accompanied by a letter in the words and figures following,—to wit:

Stokesley, 4th August, 1794.

Sir,—I send you by this day's mail coach the instructions for my will; I have been very unwell, which has prevented my returning them sooner. I hope you will receive them before you have sent off the will itself; as you will perceive I have made a very material alteration in the last folio, which, of course, must be made also in the will.

I am, Sir,

Your obedient humble servant,
Pulteney Bath.

P. S. I beg you to direct your answer to Edinburgh."

Which instrument and letter were duly received by the said John Kipling; and the party proponent doth further allege and propound, that the twenty-seventh and twenty-eighth lines from the top of the sixth sheet of the said heads or instructions pleaded and referred to in the preceding article, were obliterated and struck through in manner as they now appear, by the said Lady Bath, prior to the execution of the said instrument, being the alterations alluded to by her in the aforesaid letter.

Eighthly, That the said John Kipling, having received directions from the said Lady Bath to cause the said heads or instructions for her will to be extended in proper legal form, and being himself at the time much engaged by other business, applied to the late Mr. Holiday, a conveyancer of eminence, in order to recommend him some proper person to frame a will for the said Lady Bath pursuant and in conformity to the heads or instructions which had been so as aforesaid executed; and in consequence thereof, the said Mr. Holiday recommended for

that purpose a draftsman, whom he had been used to employ, namely, Christopher Wightman, of the Temple, London, to whom some time in the beginning of the month of August, 1794, the said John Kipling did deliver the heads or instructions for a will hereinbefore pleaded and executed by Lady Bath, in order that he, the said Christopher Wightman, might prepare a will, strictly conformable thereto, in proper legal form.

Ninthly, That soon after the premises mentioned in the next preceding article the said Christopher Wightman did, from the heads or instructions so delivered to him, prepare a draft of a will or testamentary appointment for the said Lady Bath; and having so done, he delivered the said draft to the said John Kipling for his perusal and approbation; and the same having been inspected by the said John Kipling, *but the difference therein between the said draft and the said heads or instructions having, in fact, escaped his observation, he caused two fair copies thereof to be made for execution, which were delivered or transmitted to the said Lady Bath.*

Tenthly, That soon after the two fair copies of the draft of the said will had been received by the said Lady Bath, she directed an alteration to be made by extending the bequest of the residue of her personal estate to or for the benefit of the said Elizabeth Evelyn Fawcett, formerly Markham, and her issue, to take effect as well in the event of there being only one daughter, and no other child of her, the said testatrix, as in the event expressed in the said instructions of there being one only son; and further, to bequeath the said residuary personal estate, in default of issue of the said Elizabeth Evelyn Fawcett, formerly Markham, to an only child of her the said testatrix, whether son or daughter, in preference to the brothers and sisters of the said *Elizabeth Evelyn Fawcett; but did not discover the omission and difference between the said fair copies and her original heads or instructions so executed by her as before pleaded, and in conformity with which she had directed the same to be prepared for execution.* That the alterations so directed by testatrix were accordingly made in the residuary bequest by the said Christopher Wightman, or by his clerk, which rendered it necessary to take away some of the sheets of the said two fair copies, and to substitute other sheets in lieu thereof, in order to give effect to such alterations.

Eleventhly, That after the aforesaid two fair copies of the said will had been altered in manner mentioned in the next preceding article, the said Lady Bath being of sound and disposing mind, and having an intention to execute the same as and for her last will and testament, did, on or about the 5th day of November, 1794, duly sign, seal, publish, and declare, each of the said two copies or parts of a will, as and for her last will and testament in the presence of several credible witnesses, three of whom, in her presence, at her request, and in the presence of each other, did severally set and subscribe their names as witnesses thereto.

Twelfthly, That after the two parts of the will had been executed, as pleaded in the next preceding article, the same were sealed up in envelopes or covers; and immediately afterwards one part of such will was delivered to the said John Kipling, and the other part thereof was left in the possession of the said Lady Bath.

Thirteenthly, That in supply of proof of the premises mentioned, and set forth in the preceding article, the party proponent prays leave

to refer to the last will and testament of the said Lady Bath remaining in the registry of this court, upon which a probate issued on the 22d August, 1800, and doth allege and propound the same to be one of the parts of the will, so executed by the said deceased on the 5th day of November, 1794, being that part which was so as aforesaid delivered to the said John Kipling, sealed up, and which remained in his custody and possession so sealed up, until and at the time of the death of the said Lady Bath.

Fourteenthly, *That at the time when the said Lady Bath so executed her said will, on the 5th of November, 1794, she apprehended and believed that the bequests therein contained, were in strict conformity with the heads or instructions which she had formerly executed, save and except in so far as she had directed the residuary bequest to be altered in manner as pleaded in the tenth article; and neither the said John Kipling, nor the said Christopher Wightman, the draftsman, employed under him, had ever received any instructions whatsoever different from or other than the heads or instructions hereinbefore pleaded, and the said alterations in the residuary clause, as specified in the said tenth article.*

Fifteenthly, *That no omission in the said will, or difference between the said will, and the heads or instructions for which it was drawn, other than the alterations specified in the tenth article, was discovered during the lifetime of the said Lady Bath, but that since her death it hath been found that the clause inserted in the said will, for disposing of the residue of the said deceased's personal estate, in the event which hath happened of her dying without leaving any issue, differs from and is not co-extensive with the clause in the instructions applying to the said residuary bequest in the same event, inasmuch as that by the said will the said Lady Bath, after the death of Sir William Pulteney, her father, and Sir James Pulteney, her husband, and the death of the survivor of them, directed her trustees thereinbefore mentioned to apply her said residue, and the interest and dividends thereof, for the sole and separate use and benefit of the said Elizabeth Evelyn Fawcett, formerly Markham, and for the use and benefit of the issue of the said Elizabeth Evelyn Markham, in the case only of the said testatrix having one child living at the time of her own decease, (as in and by the said will, reference being thereunto had, will more fully and at large appear) whereas, by such heads or instructions, the said testatrix ordered and intended her said trustees, after the death of Sir William Pulteney, her father, and Sir James Pulteney, her husband, and the death of the survivor of them, to apply the interest of her said residue to the separate use of the said Elizabeth Evelyn Fawcett, formerly Markham, for her life; and after her death to her children and grandchildren, as she, the said Elizabeth Evelyn Fawcett, formerly Markham, should appoint, in the case of the default of younger children of her the said testatrix, meaning thereby whether such default of younger children arose from a total failure of issue of the said testatrix, (which is the event which hath happened), or by her leaving an only child, as in and by the said heads or instructions, reference being thereunto had, will more fully and at large appear. And the party proponent doth expressly allege and propound that such difference in the said will arose solely through the error and inadvertency of the said Christopher Wightman, the draftsman, employed to prepare*

the same, and from the said John Kipling having relied too much on the accuracy of such draftsman, and not having taken sufficient time to peruse and consider the said draft, as compared with the heads or instructions.

Sixteenthly, That on the 22d day of August, 1808, a probate of the said will of the said deceased, bearing date the 5th day of November, 1794, with a codicil thereto bearing date the 24th day of July, 1805, but without the said heads or instructions for a will executed as aforesaid, on the 3d day of August, 1794, was granted under seal of this court to Sir Thomas Jones, Bart. (then Thomas Jones, Esq.) and Christopher Codrington, Esq., two of the executors named in the said will; a power being reserved of making the like grant to John Kipling, Esq. the other executor.

Seventeenthly, That the party proponent doth herein and hereby propound the said will of the said deceased, bearing date the 5th day of November, 1794, and the said instrument of instructions for the same, executed by the said party, deceased, on the 3d day of August, 1794, as containing together the true last will and testament of the said deceased, to which there is a codicil, dated the 24th day of July, 1805.

Eighteenthly, That the said Lady Bath had through her life the most unbounded affection and friendship for the said Elizabeth Evelyn Fawcett, formerly Markham, who was her cousin, and brought up much with her in their youth. That such the said Lady Bath's attachment towards the said Elizabeth Evelyn Fawcett continued equally strong after her marriage with her present husband, John Fawcett, as it had been while she was the wife of the Reverend George Markham, Doctor in Divinity; and such her affection and friendship continued to the day of the death of the said Lady Bath, who frequently spoke of the said Elizabeth Evelyn Fawcett and her children, as being the principal objects of her testamentary bounty.

Barnaby and Daubeney, for the executors, opposed the admission of the allegation.

The question divides itself into two parts,—first, whether there has been that omission in the will of the deceased, which it is now proposed to rectify; and, secondly, whether the Court would have the power to rectify it, should it be established.

In regard to the first; if there be in fact no omission or defect in the testator's meaning, there can be no need for this extraordinary interposition of the Court. The will is not impugned upon any of the usual grounds on which wills are objected to in this Court; is not contested on the ground of any fraudulent imposition practised on the deceased, or the want of capacity, nor on the ground of imperfection in the substance of the instrument; for if it were an imperfect testament the presumption of abandonment might arise, and we should be placed in a situation very different from that in which we now stand before the Court; we should be called upon to support a paper presumed to be abandoned, by the aid of parol testimony introduced to establish the intention of the deceased, and not to resist the introduction of evidence for the purpose of making an addition to a regularly and solemnly executed paper.

With regard to the second question, whether the Court has the power to rectify an omission of this description, that must depend on whether parol evidence can be received to controul or vary, in any respect whatever, a will which is not impeached, on any other ground. Be-

fore the statute of Frauds it seems to have been a general rule, that no parol evidence could be admitted to controul what appeared on the face of the deed or will, not only from the danger of perjury, but from the presumption, that whatever the parties had at the time in contemplation was all reduced into writing, the last solemn act of the testator must be taken to be that which contained his intent, and his whole intent; and no antecedent act can be considered as being any part of it.

In *Ulrick v. Litchfield*, 2 Atkins 372, there was a doubt on the face of the will, to whom the testatrix had left the residue of her property, and there was a repugnancy in the words of the will: but Lord Hardwicke refused to admit parol evidence; and stated that there were only two cases in which it ought to be admitted, either to ascertain the person where there are two of the same name, and where there has been a mistake in a Christian or surname, or in the case of a resulting trust;—he added, the case before him was not one of a resulting trust, but one in which it was attempted to resort to parol evidence, to explain a doubt on the face of the will; and he referred to the case of *Strode v. Russell*, 2 Vern. 621, in which there was an appeal to the House of Lords. And Mr. Justice Tracy, who assisted Lord Chancellor Cowper on that occasion, was at first inclined to admit evidence to explain: but, upon more mature consideration, disavowed his first opinion, and was clear that it could not be admitted to supply the words of a will.

Afterwards in *Blinhorne v. Feast*, 2 Ves. Sen. 28, Lord Hardwicke, referring to the case of *Brown v. Selwyn*, which had recently occurred in the House of Lords, appeared doubtful as to the propriety of receiving parol evidence, even to that point; for he says, “Since the case of *Brown v. Selwyn*, where the Lords rejected parol evidence, I have been extremely tender of admitting it in questions of this kind, though I never doubted it where it was to ascertain identity, or in case of collateral satisfaction.” And in *Nourse v. Finch*, 1 Ves. Jun. 344, Mr. Justice Buller says, “In a case of *ambiguitas latens* parol evidence may be admitted; so in a case of fraud, perhaps of ignorance, or mistake: but it does not follow, that it ought to be allowed to prove the intent of any written paper, for that ought to be collected from the paper itself.”

In *Lord Walpole v. The Earl of Choldmondeley*, 7 T. R. 138, argued in a bill of exceptions from the Common Pleas, Hilary Term, 1797, before the King’s Bench, Lord Kenyon rejected parol evidence altogether, on the ground that there was no latent ambiguity, and that, in fact, if it was to be received, it would raise a difficulty which, perhaps, did not exist before. In that case a will made in 1752 was revoked by another will made in 1756; but there was a codicil made in 1776, which recognized the will of 1752, and appeared to revive it. There were strong circumstances to show, that the deceased did not mean to recognize the will of 1752, but that of 1756: but there being nothing on the face of the will to raise a doubt, the Court rejected parol testimony altogether, and pronounced for the will of 1752.

The practice in our Courts has been in conformity with the doctrines which result from these authorities, as in the case of *Lord St. Helen v. The Marchioness of Exeter*, Prerog. June 27, 1805. A codicil referred to a will of the 10th January, 1798; no such will was found: it was held that there were latent circumstances, requiring evidence to explain these, and therefore evidence was admitted.

In *Treacher v. Favell*, Prerog. Feb. 29th, 1804, a will, dated in 1790, referred to a fact which had happened subsequent to that period. There was another subsisting will dated in 1793; it was clear the first will was not written in 1790:—it was held an imperfect paper, and evidence was therefore admitted to ascertain the date.

Upon the whole, the preliminary step is not made out; the Court cannot be satisfied of the necessity of an interposition: but even if this point were established, it would be a most dangerous precedent to admit this allegation which has for its object, after a lapse of 15 years, to supply an omission, which may have been made by Mr. Kipling, but which can now be rectified by his evidence, and his evidence alone.

Stoddart and Jenner, for Sir James Pulteney, pursued the same line of argument as the counsel for the executor. *Lord Cheney's case*, 5 Coke 68. *Buller's Nisi Prius* 297. *Castledon v. Turner*, 3 Atkyns 257. *Lowfield v. Stoneham*, (before Chief Justice Lee.) *Cave v. Holford*, 2 Ves. Jun. 604. And the case of Sir John Chichester's will, *Sandford v. Vaughan*, ante, 62.

Swabey and Addams for Mrs. Fawcett.

In opposition to this allegation, two questions are raised:—first, whether there is a mistake, such as it is proposed to rectify; and undoubtedly, if there is not, there can be no reason for the interference of the Court: but we apprehend that it is impossible to compare these instructions with the will subsequently executed, and not to see that the draftsman has omitted that very contingency, upon which the interest of Mrs. Markham and her children is directed by the instructions to vest; that being that after the death of the survivor of her father and her husband, the estates shall go to her younger children, and in default of such issue to Mrs. Markham and her children, which certainly is not to be found in the will. There is a provision for all other contingencies but that,—that is, the will does not provide for the event of her Ladyship dying without leaving any younger child; and this is the omission we ask to supply.

We ask to be permitted to supply this by evidence which is instrumental as well as parol, upon the ground that the Court has not at present before it by the instrument which has been proved the genuine intention of the deceased, for that does not contain her whole and complete intention. We conceive, also, that if the evidence of which the allegation appears to be capable shall be thought sufficient in point of fact, that clause of the instructions which I have very recently read in addition to the will may be admitted to probate, without producing any contradiction to the will, as it at present stands; as also without the violation of any principle of law justly applying to a case under these special circumstances.

This necessarily leads to the second consideration, which is, whether assuming that there is that omission or mistake for which we contend, and which it is proposed to rectify, the Court has the power to rectify it;—for it has been argued, that the Court does not possess that power: without wishing at all to deny the soundness of the cases cited from the books of another profession, we resist the application of those cases to *this particular instance*; and if search had been made into the decisions of the Prerogative Court, it would have been found, that the same principle has been constantly acted upon, and as scrupulously adhered to, in the decisions of that branch of jurisdiction over subjects of

testamentary law, as in the Court of Interpretation. It has been derived by both jurisdictions from one and the same source; and we cite one decision to this effect, viz. the case of *Mrs. Wenman*. 200*l.* was given to a Mr. Clark to transmit to Mr. Wenman: Mr. Clark was about to undergo inoculation, previous to which he made his will, and bequeathed this 200*l.* to Mr. Wenman. He recovered, and did not alter his will; but afterwards he gave the 200*l.* to Mr. Wenman,—afterwards died, and his representatives sued for the 200*l.* under Mr. Clark's will. It was resisted on the ground of these circumstances: but they being all circumstances before the will, and being adduced merely to control the construction of it by parol, Sir George Hay overruled it on the authority of *Selwyn v. Brown*, and many of those cases which have been cited fully affirming those principles which equally prevail in all courts of construction.

But we are now before a court of probate, of which I apprehend it is the peculiar office to see that the testamentary paper should be such as the testator intends to take effect; for though no form is necessary, provided intention be expressed, yet intention being the very essence of a testamentary disposition cannot be dispensed with. Nor is the intention only necessary, but it constitutes and makes itself the will in all cases; and the evidence requisite to satisfy a court of probate what a testator intends, and what he does not intend, except in cases of nuncupation, that is, as applied to all written testaments, is not to be reduced to certainty by any particular rules Courts can lay down. It will always depend upon the circumstances of each particular case, on which the Court will exercise a full discretion as to their result; and that parol evidence in a case of the present description is admissible, appears to be a position not admitting of a particle of doubt;—are we not in the daily habit of admitting it to prove every paper of a testamentary nature? at the same time we know it is a general rule where it is to control the construction of what appears upon the face of a will or deed, that it is admitted only to explain an uncertainty, and to rebut an equity before a court of equity; but in a court of probate it is of necessity more liberally indulged. It is indeed the principal evidence on which the validity of testamentary acts can be decided. When a paper is once established, and it is pronounced to be what it purports, Courts undoubtedly entertain a great deal of jealousy in suffering a party to travel out of the paper to ascertain a different sense from the immediate purport of the words, and then to enquire what is the meaning of the testator. But what is the business of this Court, but to find out the will of the testator, and whether the paper propounded as such is his will?—how otherwise is it possible for the Court to decide, when two papers are propounded by different parties, which shall be received—it could not go on without proof dehors the will in order to discover to which the stamp of its authority is to be given; and it would be inconsistent to say you shall not in such cases go into evidence of the fairness of the transaction, and enquire whether you have the whole will before you or not.

It has been admitted that where there is force, fraud, or incapacity, parol evidence may be admitted; but it is contended that it cannot be admitted to intrench upon a regularly executed act, because a Court is to decide upon intention, and wherever there is either force, fraud, or imposition, intention is wanted.

In like manner where there is a will which has been altered by change of circumstances, as by marriage, and the birth of a child,—would not parol be admitted? And why would it be admitted there? Because there the Court decides on intention, on a presumption that the intention the testator once entertained had become altered. It may also happen that you have a later executed instrument, and an instrument, of an earlier date, remaining uncanceled; and there have been cases where by parol merely the testator has revived the one, and it has been on that evidence pronounced for as the true will of the deceased; that is from circumstances dehors the will; and by parol merely. And as nothing is to be admitted into the will which is not the intention of the testator, so whatever is found to be such must be admitted: and there have been many cases decided on solemn argument, wherein there being instructions or written proofs, those written proofs being corroborated by parol testimony, have afforded ground for pronouncing for the two papers together, and of supplying the omissions of parties as well as of expunging mistakes in written instruments, when that which was inserted has been proved not to accord with the true intent of the testator.

In the case of *Bridge v. Arnold and Cranke*, Prerog. 1775, the words which were expunged had been inserted by error. The case was of this description:—the surplus had been given in trust, and there had been incorporated by a mistake of the attorney these words, “for the benefit of the trustee,” or rather, I believe it had been given to him for his own use and benefit, instead of “as a trustee;” and it was proved, the testator had given directions to insert those words “as a trustee.” It was contended in that case, that parol evidence could not be admitted against what appeared to have been the words of the testator: but the Court said it was manifestly an error, and that the testator was ignorant of those words being inserted, and therefore they could not bind; and the Court directed them to be expunged, and as my note says, “following the intention of the deceased.”

Barton v. Robins, (a) which afterwards went to the Delegates, was the case of an insertion by fraud. It was the case of an old woman who

(b) The following report of this case, as far as relates to the proceedings in the Prerogative Court, is taken from a MS. in the handwriting of the late Dr. Swabey:—

PREROGATIVE COURT.

BARTON v. ROBINS.

Dr. Wynne.—Not sufficient evidence to support the will;—eye-sight bad. Sarah Barton and Moore say not able to read. In point of law a will of a blind person not good, unless all read. The evidence is—this will was not all read. Sarah Barton says, Can you read it?

Total deficiency of proof that Robins was appointed executor and residuary legatee. Swinburne on Blindness. Domat. Law in Code, 6th Book, 22 Tit. 8th Law. Case of *Moor v. Pain*, in the Delegates. Blind man's will set aside for want of the form of reading over. Robins had disobliged her;—evidence of four witnesses as to that.

Curia. (Sir GEORGE HAY.) A very special case;—had very little doubt if it had not been for the evidence on the part of the next of kin,—Moore, Barton, Beavan. Until the said Robins had done reading, heard nothing of an executor,—Barton, and other legatees,—Mrs. Beavan. Will begun, not finished;—heard nothing but legacies. If they had not proved a part to have been read, it would have been incumbent on Robins to have proved the will to have been read over. *Parminster and Butler*, or *Butler v. Parminster*, the whole will set aside, chiefly because

had nearly lost her sight, and the attorney who drew the will had inserted the residue to himself. The old woman had some suspicion; she sent for the attorney, who made excuses for not coming; and she never could obtain the will from him; he kept it back, under pretences of different kinds. The Court had no doubt, in that instance, as to the receiving parol evidence; and, on the evidence of these circumstances, ordered the clause of the residue to be struck out. These are cases in which clauses were expunged on parol evidence merely.

The case of *Damer v. Pechell and others*, Prerog. 1778, appears to be precisely similar to the present. Mr. Janssen had written instructions for his will, which he had given in his own handwriting to Mr. Robinson, his attorney, in which there was a clause appointing his younger daughter residuary legatee. Mr. Janssen put this at the top: Mr. Robinson intending to put it at the bottom, in his hurry he passed

the deceased being a paralytic, and not able to read it over, the contents were not known by the deceased or proved to be read over, and the writer was the residuary legatee. The ancient law, that the writer shall have no legacy not received here it is true: but then there must be an evidence that the contents are known. My opinion is, that the part not proved to have been read over will be void. A blind man's will established upon a proof that he knew the contents of the will, though not read over before the witnesses. I must look on the deceased as a person blind:—incumbent upon Robins to show he was executor or residuary legatee. Samuel Webb—That deceased said to Robins she desired to have a handsome funeral, but a single witness. Gaby says,—The deceased said you will do the best you can. What are the collateral circumstances? That he should have a benefit?—nothing more unlikely;—not a tittle of evidence that she ever designed any favour to Robins, he being a stranger, an attorney, and nothing to show intention to benefit him. Why did not Robins go on the 30th?—the father went;—not a word said by the father about his son being executor, or having the residue. A moiore given to Robins;—it is a material circumstance. I can easily account why Robins should decline the moiore; but cannot why the deceased should press him three times, had she known or intended him to be her residuary legatee. *In point of law, the writer, who is benefited, must show that the contents were known.* No proof but Webb;—that only as to executor;—it would have done if he had not the residue. Pronounce for so much of the will as does not benefit the writer.—*Expunge the residue.* Revoke the probate, and decree administration with will annexed to the next of kin. No costs. I put it *for defect of evidence.* There are *suspicious circumstances* in the case.

The decree from the minutes.—Pronounced for the force and validity of so much of the will as relates to all the legacies bequeathed in the will, except the legacy of the residue to Henry Robins, the writer of the said will, and the appointing of him as an executor; and did also pronounce for that part desiring Mr. Robins to take care of the funeral; but did pronounce against the force and validity of so much of the said will as bequeathed the residue to the said Henry Robins and appointed him executor, and revoked the probate heretofore granted of the said will, and decreed the said deceased to have died intestate as to the residue of her personal estate; and decreed letters of administration with so much of the said will as is pronounced for only, omitting from the words “all the rest, residue, and remainder,” in the seventh line, to be computed from the bottom of the said will, to the words “fully executed” in the fourth line, to be computed from the bottom of the said will, to be granted to Mary Barton, Holman's client, the cousin-german and next of kin of the deceased.

From this sentence an appeal was interposed to the High Court of Delegates, which on the 18th Nov. 1769, affirmed the sentence of the Prerogative Court, and condemned the appellant in costs. The Judges present were Mr. Baron Smythe,* Mr. Justice Aston, Dr. Ducarel, and Dr. Bever.

* Mr. Baron Smythe is styled in the Court Book of the Delegates, the Honourable and Reverend Sir Sidney Stafford Smythe, Knight, one of the Barons of his Majesty's Court of Exchequer.

it over, and omitted it altogether. Mr. Janssen, after inspecting the draft drawn out by Mr. Robinson, returned it to be engrossed, which was done accordingly, and he afterwards executed it. The executor was called upon to take probate of the instructions as part of the will, and Doctor Calvert pronounced for them as such. The cause was appealed to the Court of Delegates,^(a) who thought the mode in which the sentence was given, including as it did the whole of the instructions, was not correct, but declared for the clause appointing the daughter residuary legatee, together with the executed will, as containing together the last will of the deceased.

There is a case very similar to that which is much more recent, in this Court, of *Gerrard v. Gerrard*, Prerog. 1789, by her guardian. It is the case of a will of a Dr. Gerrard. A caveat had been entered by Mrs. Gerrard on behalf of the daughter, not as opposing the will, but submitting to the judgment of the Court whether certain words ought not to be introduced into the will on evidence of the intention of the deceased. The facts of the case were, that Dr. Gerrard died, leaving his widow and a daughter. That in June, 1787, he had written instructions for his will, and delivered them to Mr. Morrell, an attorney, of Oxford; and that, towards the latter end of the month, he had written to Mr. Morrell, desiring him to insert his wife as residuary legatee:—the term he used in his letter was, “my dear wife;” and it not being recollected, at that time, by Mr. Morrell, what was her Christian name, a blank was left for it in the will. The testator altered the draft in some trifling particulars, and then transcribed it, but still he omitted to insert the name of his wife; and having transcribed it, he afterwards executed it. Two witnesses were examined. Mr. Morrell deposed that he knew the handwriting of the testator, and he proved the instructions and the letter from which he drew the draft;—that he believed that he meant to make his wife executrix, and to give her the residue of his property that he had; and that he apprehended it must have been a mistake, and that the omission arose from his not observing the blank. It was also proved that the testator had subsequently stated that he had left his wife executrix and residuary legatee. The Court said it was impossible to prove any thing more clearly; and that as to its being said that if a man does not take sufficient care, he must abide by the conse-

(a) I am indebted for the following epitome of this case to an advocate of great experience in the Ecclesiastical Courts, from whom I have derived much information and advice in the compilation of these Reports.

Delegates, 14 Feb. 1783. Mr. Justice *Willes*, Mr. Baron *Eyre*, Mr. Justice *Nares*, and Dr. *Macnam*.

BLACKWOOD v. DAMER.

M. Janssen wrote with his own hand instructions for a will, in which he left the residuum to his youngest daughter, since married to the Honourable Lionel Damer. The attorney, in writing over the will, omitted the residuary clause; some other variations were made; the draft was read over to the testator, and left in his custody two days: the will was executed in due form, contained legacies to the executors. The testator always afterwards expressed himself as having left the residuum to his youngest daughter. The attorney deposed, that it was merely an omission: the other variations he supposed he had received verbal instructions to make.

The Court below had pronounced for the instructions as part of the will.

The Delegates decreed that the residuary clause should stand as part of the will, but no other part of the instructions.

quences, the Court did not agree to that. The case of Mr. Janssen's will was then cited; and it was said that in point of principle the cases were the same, but in point of evidence, clearly they were not; and I think upon the letter, or one part of the instructions not having been propounded, it was said that the Court could not pronounce for papers not propounded. But there have been cases of that sort:—there was one case before Sir George Hay, where he pronounced for a paper, although it had not been propounded, and the Court, in this instance, under the authority of the case before determined by Sir George Hay, declared for the validity of a paper which had not been propounded.

There are other cases in the recollection of the Court: that of *Micklin v. Franklin*, Prerog. 1789, where the testator had executed a codicil, merely intending to revoke a single legacy which appeared to be written from inadvertency only on a wrong will, which his codicil purported to revive. On evidence as to the circumstances being gone into, and the Court being satisfied it was from error, and not with an intention to revoke that will, the Court pronounced for the codicil; and the will of 1786 was received, directly against the contents of the codicil of 1789, which was an executed instrument.

The case cited of *Lord Saint Helens v. the Marchioness of Exeter* (a)

(a) PREROGATIVE COURT OF CANTERBURY.

Lord ST. HELENS *v.* The Marchioness of EXETER.

JUDGMENT.

SIR JOHN NICHOLL.

An executed will and two codicils of the Marquis of Exeter are propounded. The will is dated on the 13th December, 1800;—the first codicil on the 1st December, 1802;—the second codicil on the 13th November, 1803.

The execution of these instruments is fully proved. The question arises upon the first codicil, which is all in the hand-writing of the testator, and begins—“This is a codicil to my last will and testament, of the 10th January, 1798; and I do hereby ratify and confirm my said will.” On the part of the executors it is alleged, that at the time of the execution of the codicil the deceased was at Burghley, and copied this from a form which he had procured from his solicitor, and inadvertently copied the date from a former will, which it is presumed has been destroyed, as it cannot be found. But the question is,—whether, being recited as a codicil to the will of 1798, the Court can pronounce it a codicil to the will of 1800, and can receive evidence to show, in contradiction to the terms of the paper itself, that it was of a different date.

Undoubtedly this Court has the power, in some cases, of admitting parol evidence to prove intention. The rule laid down by Lord Bacon in his twenty-third Maxim is, “Ambiguitas verborum latens, verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur.” In Bacon's Abridgment, (p. 653) the case is put of a father having two sons, John and Thomas, the former of whom had died long before the making of the will, a fact well known to the father; and in the will he left a legacy to “John,” the deceased son, instead of to Thomas, the living one; and evidence was allowed to be gone into to rectify this mistake. It is true that in this case, a will bearing date January 1798 had been made: but he afterwards married, and in 1800 made another will, and in 1802 a codicil to that will. The will of 1800 is found duly executed, and carefully preserved sealed up, with this codicil also. The will of 1798 cannot be found, and is to be presumed to have been destroyed by the deceased. What is to become of the codicil of 1802? It is recited to be a codicil to the will of 1798; and confirms that from which the deceased had manifestly departed, by making another will:—these, surely, are latent ambiguities which may let in evidence to show intention. The evidence shows that he could not mean to revive the will of 1798;—it appears that he clearly looked on the codicil of 1802 as that which should

was one of the same description. That was a mistake as to the draft of a codicil, which stated itself to be a codicil to the will of 1798, though intended by the testator to apply to a later will. I believe the former will no longer subsisted: there could be no doubt of the facts; they were facts which could be only supplied, and were supplied only by the testimony of Mr. Foulkes, his Lordship's solicitor, who was very much in his confidence. These cases are sufficient to show that this Court, as a Court of Probate, is not bound to grant probate of every paper signed and attested without admitting parol testimony, as to the fact which always refers to the intention of the deceased, as well as whether there is a fair execution by the deceased, or whether there may have been error or fraud.

There is very little distinction in principle between the allegation which was admitted in *Janssen v. Pechell*, and that now offered for your consideration; the prayer undoubtedly is not extended;—I do not know that it was in the other case,—I believe it was not. The citation was there to call upon the executors, to take probate of the will with the instructions: the Court pronounced only for the residuary clause in the instructions. Our citation asks for probate of the will, together with the residuary clause in the instructions. Undoubtedly we cannot go beyond that, but we are not obliged to go to that extent; and we probably shall ask the Court if we are urged to give our proof to pronounce for this in the manner I have before adverted to, and which will not interfere with the executed will, except so far as to supply that which we contend is wholly omitted. We consider that executed will as containing provisions for other contingencies, but not as embracing this.

This insertion undoubtedly would not at all interfere with the power this Lady enjoyed of disposing of her residue by will as a femme coverte; she must comply with the power given to her, and she must comply precisely. But we submit she will be found to have so complied by as many instruments as she shall have made, if they are deeds or wills, in the presence of a certain number of witnesses; her power of testacy then is not restricted. But it has been said there is an obstacle not at all to be got over in the case, for there is in the will a clause of revocation. It will be sufficient to reply, that in Mr. Janssen's will there was a clause of revocation, and that can operate only so far as it was intended to revoke, and no further. The instructions, very fortunately in this

operate. Foulkes, who is principally benefited, appears to have been a person much in his favour:—annuities are given which the codicil recites, that Sims was in the habit of paying in his life.

He sent to his steward to send this codicil to him in London, and therefore he could not consider it as done away by the destruction of his will; and having the copy of a codicil from his attorney, in which the recital was from a will of 1798, it was a natural ground for the mistake.

It is said that in the case of Lord *Cholmondeley v. Walpole*, (7 Term Rep. 749.) the Court of Common Pleas refused parol evidence to explain intention, and that this was affirmed by the King's Bench. But in that case there was no error on the face of the paper; there was a perfect will remaining, and a codicil referring to that will. The evidence would have gone to establish another will.

Here the case is very different; the will to which the codicil refers does not exist, and the subsequent marriage made it highly proper that there should be another will. Having endorsed this *a codicil to his will*; having sent for it about two months before his death, and kept it with his will; I think there is just and legal ground for the Court to presume, that he intended it for a codicil to the will of 1800, and to pronounce for it.

case, appear to have received the solemnity of an act of execution, as well as the will, which is a strong part of the case, because we ask nothing to be taken in connexion with the will except what arises upon the face of those executed instructions; and it may be here remarked, that the authority cited from Swinburn appeared a special authority for one act only, and not to apply to an authority so large as that of Lady Bath.

It is said that, considering the different occasions on which these fair copies were before her ladyship, and that she made some alterations in the residuary clause after those fair copies had been communicated to her, she must have perceived this, and that having perceived it, and having executed the will, she must be considered as having adopted it in the state in which it stands:—we argue from the very tenor of those alterations made, that she meant not to restrain, but to enlarge, the beneficial interest which she had originally intended, to Mrs. Markham, and her family, by her instructions, and that she never varied from those instructions, except with an intention to increase it; and as to suppose that she might overlook it, I think that is not going a great way, when my learned friends and ourselves find no little difficulty, comparing the one instrument with the other, in saying, what has been provided for and what has not. With respect to the draft being extended from the instructions, as it is contended to be in legal form, all these long additions and amplifications being added, as to the distinctions between different children, in whom property was to vest, at twenty-one, or marriage, or in case of survivorship, have led, most probably, to this omission, and that her Ladyship should not perceive, when Mr. Kipling did not perceive the omission of this particular clause, is not that at which this Court would express any very great surprise.

It has been said the Court ought to lean, since the statute of Distributions, in favour of the husband, in cases of this kind: that is an observation, I think, of no very great weight; for the Court will have no leaning but that of the law, and the leaning of the law is to follow the intention of the party. That it was not the intention of Lady Bath to give her husband more than a life interest is clear and manifest upon the will itself: there is no occasion to travel out of the instrument to discover that; for the very last clause she has added shows it. Supposing Mrs. Markham to die without leaving any issue whatever, she then inserts an only child of her own, whether son or daughter; the insertion seems merely to exclude (if there should be such a child) the brothers and sisters of Mrs. Markham; but if there shall be no such child, she then gives that interest which Mrs. Markham and her family would have to the brothers and sisters of Mrs. Markham; and the very postponing the interest of an only child to the event of this Lady dying without leaving any issue appears to me to create an inference too strong to fail of its effect as to the intention of this lady, and to show that her intention of leaving this property to Mrs. Markham applied equally to that event which has taken place, she using the term “younger children” only in that part of her instructions, because no eldest whatever had ever been mentioned; and it appearing from the whole tenor of that instrument, that an eldest was not at that time at all in her contemplation, the testatrix knowing, or at least thinking, that an elder child would be amply provided for by other means.

We trust, upon the whole, on the authority of *Janssen v. Damer*,

Gerrard v. Gerrard, and the several other cases wherein it has appeared that the Court has exercised the power, not only of supplying facts, but of remedying the mistakes as well as the frauds of parties, that we are entitled to ask the admission of this allegation.

JUDGMENT.

SIR JOHN NICHOLL.

The question in this case arises upon the will of the deceased Lady Bath, who died in 1808. The will is dated on the 5th of November, 1794, and the codicil on the 25th of August, 1805. Probate of the will and codicil was taken out by the executors named in the will. That is called in, nearly twelve months afterwards; and the executors are cited to take a new probate of the will and codicil, and of some executed instructions, *as together containing* the will of the deceased. The circumstances of the case are very fully stated in the allegation, which has been given in. That allegation states, first, that Lady Bath died on the 14th of July, 1808, leaving behind her Sir James Pulteney, her lawful husband, but no issue. Secondly, That articles of agreement were entered into in contemplation of a marriage between Lady Bath and Sir James Pulteney, whereby all the real and personal estates belonging to Lady Bath, except as therein mentioned, were agreed to be conveyed, assigned, surrendered, and transferred, to certain trustees who should make such grants, assignments, and so on, as Lady Bath should from time to time after the solemnization of the marriage direct by deed or will, executed by her, and attested by three or more witnesses. Thirdly, That while these articles were in preparation, and before the execution of them, Lady Bath gave verbal directions to John Kipling, Esq. of the six clerk's office, who acted as her legal adviser, to prepare a new will for her. It appears that she had executed one previous to the marriage: but she gave directions for another which she intended to execute soon after the solemnization of the intended marriage. That pursuant to these directions Mr. Kipling did prepare an instrument in the nature of heads or instructions for a will which was delivered to Lady Bath a short time before the marriage, the marriage taking place upon the 24th of July, 1794. Fourthly, That Mr. Kipling afterwards attended Lady Bath several times to adjust the instructions; and after the same had been adjusted, they were fair copied by order of Mr. Kipling, it being thought expedient that they should be executed by Lady Bath, in consequence of her being on the eve of departure for Scotland, to remain for some months immediately after her marriage, and before a will or testamentary appointment could conveniently be extended in legal form, pursuant to such instructions. That upon the last sheet of the fair copy Mr. Kipling caused a memorandum to be written in the words following: "The above instructions contained in this and the preceding sheets have been given by me to John Kipling, Esq., in order to enable him to prepare my will or testamentary appointment in nature of a will: but as it cannot conveniently be prepared and executed before my leaving London, I do therefore publish and declare this paper writing, contained in six sheets, as and for my last will and testament, or testamentary appointment, in the nature of a will, pursuant to and in execution of a power reserved to me by my marriage articles, and of all other powers in me vested, or enabling me in that behalf; and direct that it shall have the same force and effect as if a will had been executed pursuant to these instructions."

The articles go on to plead “that soon afterwards these instructions so prepared were delivered to Lady Bath. Fifthly, That Lady Bath kept the instructions under consideration for several days, and in her own hand made several alterations therein. That on her way to Scotland she paid a visit at Stokesley, in the County of York, the residence of Mrs. Elizabeth Evelyn Fawcett, then Markham; and while there on or about the 3d day of August, 1794, signed, sealed, published and declared, the said instructions as her last will and testament, or testamentary appointment, and the execution was attested by three witnesses.” [So that this instrument is attested in the manner required by the power. If there were any defect in that respect, of course it would be fatal: but it was executed according to the power.]

The sixth article refers to these instructions.

The seventh then goes on to plead “that Lady Bath, after having executed the said instructions for her will, transmitted the same to Mr. Kipling, accompanied by a letter, as follows:—

“Sir,

Stokesley, 4th August, 1794.

I send you by this day’s mail coach the instructions for my will. —I have been very unwell, which has prevented my returning them sooner. I hope you will receive them before you have sent off the will itself, as you will perceive I have made a very material alteration in the last folio, which of course must be made also in the will.

I am, Sir,

Your obedient humble servant,
Pulteney Bath.

P. S. I beg you to direct your answer to Edinburgh.”

The article goes on to allege “that the two lines 27 and 28, from the top of the sixth sheet, were obliterated and struck through in the manner they now appear prior to the execution of the instrument,” [that being the alteration alluded to in the letter, which was only interposing certain persons between Mrs. Markham’s issue, and her brothers and sisters, and therefore not material to the present consideration, except for the purpose of showing that the testatrix had paid particular attention to her disposition of this residue.] Eighthly, That Mr. Kipling having received directions from Lady Bath to cause these instructions for her will to be extended in proper legal form, and being himself much engaged by other business, applied to the late Mr. Holiday, a conveyancer of eminence, in order to recommend him some proper person to frame a will for Lady Bath, in conformity to the instructions which had been so executed; and he accordingly recommended his draftsman, Mr. Christopher Wightman, to whom some time in the month of August, 1794, Mr. Kipling delivered the instructions in order to prepare a will in strict conformity thereto. Ninthly, That Mr. Wightman did prepare a draft, and delivered it to Mr. Kipling for his perusal. That the draft was inspected by Mr. Kipling; but the difference between the draft and the instructions escaped his observation; and he caused two fair copies thereof to be made for execution which were delivered or transmitted to Lady Bath.

[The draft of the will is brought before the Court, and it appears to have undergone a very careful revision; there are alterations in various parts, and particularly in this, which I should apprehend to be in the handwriting of Mr. Kipling himself.]

The tenth article is important. "That after the two fair copies of the draft of the will had been received by Lady Bath, she directed an alteration to be made by extending the bequest of the residue of her personal estate for the benefit of Mrs. Fawcett, then Markham, and her issue, to take effect as well in the event of there being only one daughter, and no other child of her, the testatrix, as in the event expressed in the instructions of there being one only son; and further to bequeath the said residuary personal estate in default of issue of the said Elizabeth Evelyn Fawcett, then Markham, to an only child of her the said testatrix, whether son or daughter, in preference to the brothers and sisters of the said Elizabeth Evelyn Fawcett; but did not discover the omission and difference between the said fair copies, and her original instructions so executed by her. That the alterations so directed by the testatrix were accordingly made in the residuary bequest, by Mr. Wightman, or his clerk, which rendered it necessary to take away some sheets of the two fair copies and to substitute others.

Eleventhly, That after the fair copies had been altered, they were executed by Lady Bath, on the 5th of November, 1794, and attested by three witnesses.

Twelfthly, That the parts were sealed up in envelopes, one delivered to Mr. Kipling, and the other to Lady Bath."

Here are then fresh instructions given by the deceased herself, founded upon a consideration and an accurate observation of this draft of the will itself, and especially referring to the disposal of the residue. It is said that the fresh instructions were given as well in the event of there being only one daughter, and no other child of her the testatrix, as in the event expressed in the said instructions of there being only one son. Now I see nothing in these instructions as to the event of there being only one son. Nothing of the sort is here introduced, and therefore there must have been some previous instructions given in some way or other as to this event, for it does not form a part of these instructions; and if the Court pronounces for these instructions in conjunction with the other, it pronounces for them without those intervening instructions, which may have very materially varied the former instructions.

The thirteenth article refers to the will in the registry of this Court on which probate was taken, being the part which remained in the custody of Lady Bath.

The fourteenth pleads, "that when Lady Bath executed the will, she apprehended it was in conformity to her instructions, except as she had directed the residuary clause to be altered, and that neither Mr. Kipling nor Mr. Wightman had ever received any instructions whatsoever, different from or other than the executed instructions:" [but of that I must observe, the Court can only be furnished with the parol evidence of these persons, speaking to what passed fifteen years before they can be examined. Yet it is quite clear that there were some intermediate instructions.]

The fifteenth pleads, "that no omission in the will, or difference between the will and the instructions from which it was drawn (other than the alterations specified in the tenth article,) was discovered during the lifetime of Lady Bath: but since her death it has been found that the clause inserted in the said will for disposing of the residue of her personal estate, in the event which has happened of her dying without leaving any issue, differs from, and is not coextensive with, the clause

in the instructions applying to the said residuary bequest in the same event, inasmuch as by the will Lady Bath, after the death of her father and her husband, and of the survivor of them, directed her trustees thereinbefore mentioned to apply the residue and interest for the separate use of Mrs. Fawcett, and for the use and benefit of her issue, in the case only of the testatrix having one child living at the time of her own decease: whereas by the instructions she ordered and intended her trustees, after the death of her father and husband, to apply the interest of her residue to the separate use of the said Mrs. Fawcett for life, and after her death, to her children and grandchildren, as she, the said Mrs. Fawcett should appoint, in the case of the default of younger children of the testatrix; meaning thereby, whether such default of younger children arose from a total failure of issue of the said testatrix, or by her leaving an only child:" [now to this part, pleading her intention and meaning, parol evidence alone can be introduced,]—"That such difference arose solely through the inadvertency of Mr. Wightman, the draftsman employed to prepare the same, and from Mr. Kipling having relied too much on the accuracy of such draftsman, and not having taken sufficient time to peruse and consider the said draft, as compared with the said heads or instructions."

"The sixteenth article pleads, that on the 22d of August, 1808, probate of the will and codicil, but without the instructions, was granted to Sir Thomas Jones, and Christopher Codrington, Esq., two of the executors named, a power being reserved of making the like grant to Mr. Kipling. The seventeenth, That the will and instructions are now propounded as containing together the true last will and testament of Lady Bath. The eighteenth, That Lady Bath had through life the most unbounded affection for Mrs. Fawcett, formerly Markham, who was her cousin; that her attachment continued equally strong after Mrs. Fawcett's marriage with her present husband, as it had been while she was the wife of the Reverend George Markham; and such her affection and friendship continued till the day of the death of Lady Bath, who frequently spoke of Mrs. Fawcett and other children as being the principal objects of her testamentary bounty."

This is the substance of the allegation which is offered to the Court; and the application certainly does seem, in its first complexion, to be one of rather an alarming sort. Here is a will regularly executed in the most formal way, in duplicate, by a person in good health and of perfect capacity, proceeding with great deliberation, paying great attention to the instrument itself, eleven years afterwards executing a codicil, and not dying till fourteen years after the will is made;—yet, upon an alleged variation between the instructions and the executed instrument, and upon an averment, which is to be supported by parol evidence alone taken fifteen years after the transaction, suggesting that such variation was not made by any directions received from the deceased, nor with her privity or knowledge, but through mere error and oversight of the drawer, and of the confidential solicitor, and of the testatrix herself,—is the Court to be called upon to pronounce for the instructions as a part of the will. This, I say, is alarming, because certainly it would be dangerous to open the door to parol evidence in order to establish such a case. If, however, the law does warrant and enjoin it, the Court has only to obey.

Many authorities have been referred to by the counsel on both sides,

and many cases have been quoted; and the present question, being one of very great magnitude in respect of property, has been very elaborately argued. It may not be necessary for the Court to restate many of those cases. It will be sufficient to extract the leading principles applying to this consideration.

I apprehend it is a general leading principle, that, when an instrument has been executed by a competent person, you must presume that the person so executing it knew the contents, and the effect of the instrument; and that he intended to give that effect to it. In order to decide, in general cases, what is the effect and construction of an instrument, you can only look to the contents of the instrument itself. If the contents be doubtful, you may receive extrinsic evidence for the purpose of explaining and construing an instrument; but I shall not now enter into the distinction between *ambiguitas latens* and *ambiguitas patens*. But if a will speaks clear of all doubt, no parol evidence can be admitted to construe it.

Another principle equally clear, and which may be comprehended partly in the former, is that a person by executing a will supersedes the instructions and the draft of that will. The will itself so declares; it states itself to be the *last* will and testament; and the testatrix has stated that she revokes all other wills; therefore, *prima facie* where any difference exists between the instructions or draft and the executed will, you must adhere to the last instrument, the will; and it must be presumed, that the deceased has either expressly directed, or at least adopted and allowed, such alteration.

The Courts have only deviated from those presumptions where some ambiguity arises upon the executed instrument. There exists no very material distinction in principle between the Court of probate and Courts of construction, so far as respects the present point.

In the case of *Matthews v. Warner*, this Court did in the first instance refuse to admit extrinsic evidence; and in that it was confirmed by the Court of Delegates, both Courts holding, that upon the face of the testamentary paper the instrument was perfect and complete; that there was no ambiguity; and therefore evidence that the testator did not intend it to be his will could not be received. But the instrument in that case, though signed by the testator declaring it to be his will, was described at the head of it as "a plan of a will;" and was also indorsed *Plan of a Will*:—it was also written on a piece of office paper, which was ruled over with red lines; and the Court of review, being of opinion that it was a case in which there was an ambiguity, namely, whether the instrument had been executed by the deceased as a will, or merely authenticated as instructions from which a will should be prepared, did admit extrinsic evidence; and the decision of the courts below was reversed, it appearing by such evidence that the deceased had no idea several years afterwards that it would operate as his will.

In the case of *Lord Cholmondeley v. Lord Walpole*, the codicil expressly referred to a will by date. The deceased had executed a subsequent will, and a doubt was suggested to which of the two wills the testator meant to refer: but the Court of King's Bench was of opinion that there was no ambiguity, and rejected parol evidence.

In the case of *Lord St. Helens v. the Marchioness of Exeter*, the codicil referred to a will not existing; therefore there was an ambiguity, and parol evidence was admitted in that case.

I must here observe, that in the Court of probate there must be some ambiguity not upon the construction but upon the factum of the instrument,—not whether a particular clause will have a particular effect, but whether the deceased meant that particular clause to be part of the instrument;—whether the codicil was meant to republish a former or a subsequent will;—whether the residuary clause was fraudulently introduced without the knowledge of the testator, (for fraud of course would go to the foundation of the will;)—whether the residuary clause was accidentally omitted as in the case of *Janssen v. Damer*;—whether an instrument be subscribed in order to authenticate it as memoranda for a future will, or to execute it as a final will, as in *Mathews v. Warner*; these are all questions of ambiguity upon the factum of the instrument. But where an instrument has been subscribed by a person of full testamentary capacity, the instrument carefully read over by that person, and repeatedly considered, and where no ambiguity whatever appears upon the face of the instrument, it must be considered whether in any case of that description the Court has admitted parol evidence; and if it have, whether it was not under circumstances establishing the error clear of all doubt.

In this case it is not suggested that there is any ambiguity in the executed will; and what the exact clause is which has been omitted has not, I think, been very clearly pointed out to the Court: but it is proposed that almost the whole of the residuary clause, as it stands in the instructions, should be taken as a part of the will. The residuary clause in the will is to this effect:—After the death of the deceased's father and husband, the testatrix gives the residue of her fortune to her daughters and younger sons; and if there shall be an eldest or only son, and but one such daughter or younger son, then she gives the whole to that daughter or younger son. The time of payment is then provided for,—the period of vested interest is provided for,—the maintenance and education of younger children are all provided for; and she goes on then to state what shall be done if she has but one child, and this is the stringent part of the residuary clause. “In case she shall have but one child living at the time of her decease, be the same a son or a daughter, or in case she shall have two or more sons and no daughter or daughters living at the time of her decease, and all of them but one shall depart this life under the age of twenty-one years; or in case she shall have two or more daughters, and no son or sons living at the time of her decease, and all of them but one shall depart this life under the age of twenty-one years, and without having been married; or in case she shall have both sons and daughters, and all but one being a son shall die under twenty-one years, or being a daughter shall die under that age and unmarried, then she leaves the residue to Mrs. Markham and her children; and if Mrs. Markham has no issue, or her issue die before their having acquired a vested interest, then the property is left to the testatrix's only son or her only daughter: but if they shall have died, and Mrs. Markham also shall have died without any issue, then it is bequeathed over to the brothers or sisters of Mrs. Markham and their executors.”

Now upon the executed instrument itself it is not contended that there is any ambiguity in respect of its effect. If there be any ambiguity upon the executed instrument, the Court of construction is the proper tribunal to decide upon that ambiguity, and to admit or reject parol evidence for the purpose of explaining it: for that Court has quite as ex-

tensive powers as this Court to receive evidence to explain whatever is ambiguous upon the face of the will itself.—But it has been contended, and so the case is put, that an ambiguity is raised by looking at and comparing the instructions given for this will with the will itself: and the instructions which are referred to are in these terms,—After giving it to her father and her husband, then after the death of the husband, “then to assign and transfer the principal and all accumulation of interest among her younger children equally to sons at twenty-one, and to daughters at twenty-one or marriage; and in default of such issue, that is, in default of younger children or daughters, to apply the interest to the separate use of the said Elizabeth Evelyn Markham, for her life, and after her death, to her children: and in default of such issue to the surviving brothers and sisters of Mrs. Markham;” between which clauses there is a subsequent interposition of the only son of the deceased. Now the ambiguity, if any, is an ambiguity in these instructions; there might be some doubt whether they are not precisely the same. It has been contended by the counsel, who oppose this allegation, that they are precisely the same; and the Court must presume that Mr. Wightman in drawing the will from these instructions, and Mr. Kipling in perusing this will as drawn from these instructions, and the deceased in perusing and executing the will as prepared from these instructions, did understand them to be precisely the same. I, however, incline to think there is a variation between them, because the instructions would seem, upon the more literal interpretation of them, to convey the residue to Mrs. Fawcett, in case there were no children at all, for it is given to her provided there are no younger children; and if there are no children at all, there are no younger children: whereas in the will it is given in the event of there being one son, and her dying and leaving one son, and so on: but if there is an ambiguity at all, it is in the instructions, for they have been obliged to plead in the tenth article, that thereby she meant and intended to give this residue to Mrs. Fawcett and her family, in the event of there being no younger children, whether that arose from there being no children at all, or from her leaving only one child.

But the matter does not rest here; for it is pleaded in the tenth article that “after giving these instructions, and the instrument being prepared, the drafts were sent to Lady Bath, and she directed an alteration by extending the bequest of the residue of her personal estate to or for the benefit of the said Elizabeth Evelyn Fawcett and her issue, to take effect as well in the event of there being only one daughter and no other child of her the testatrix, as in the event expressed in the said instructions of there being one only son; and further to bequeath the said residuary personal estate, in default of issue of the said Elizabeth Evelyn Fawcett, to an only child of her the said testatrix, whether son or daughter, in preference to the brothers and sisters of the said Elizabeth Evelyn Fawcett.” Why then it is quite clear from this account that supposing there was any difference in the residuary clause between the will and the executed instructions, yet that after the residuary clause had been prepared, the matter had been reviewed and reconsidered by her, and those very directions for the preparation of the residuary clause had been extended, and changed and altered by her; that subsequently to the bequest of the residue in default of Mrs. Fawcett’s issue to her brothers and sisters, she had substituted an only son of her own; and had gone further, and introduced an only daughter of her own, provided she left

no other child; and that then she went on to provide for the case of her dying without issue, and Mrs. Markham dying without issue; so that the whole of this was revised and reconsidered, and new-moulded by her after the draft of this will had been submitted to her consideration.

Now various conjectures may be formed in respect to the subject: perhaps the probability is that it was a matter of oversight by the testatrix herself, and Mr. Wightman, and Mr. Kipling. But can the Court in a case of this description decide upon probability and conjecture as to what was the intention of the testatrix, when it appears most clearly that she had the whole matter submitted to her own consideration, and gave these additional instructions? If there was any variation, what is the Court to presume? The Court can only *safely* presume, and can only safely allow it to be asserted, that this variation was a variation adopted by the deceased, or directed by her, or at least approved by her; it could not *safely* permit it to be asserted that the whole of this was contrary to the intentions of the deceased, and was all a complete oversight on her part, unless on circumstances amounting to the most clear demonstration that such were not the real intentions of the deceased; and that it happened either by some fraud practised upon her, or by some manifest omission on the part of the persons with whom she advised.

Among the cases which have been quoted, that which appears to come nearest the present case is certainly that of *Damer v. Janssen*; for the other cases have been very satisfactorily distinguished from the present by the learned gentlemen whom I have just heard. If the case of *Bridge v. Arnold*, where a part was expunged, that appears to have been on the ground of insanity, or the want of satisfactory proof of instructions given by a testator having capacity. *Barton v. Robins* was a case of fraud. The case of *Micklem v. Franklin* was upon the constructive revival of a former will. The other case I would also shortly notice is *Gerrard v. Gerrard*; there the will had an ambiguity upon the face of it: the words of the will were, "I appoint *her* executrix and residuary legatee." No name appeared to which the pronoun "her" referred: but, by admitting the instructions and receiving parol evidence, it was clear, the words, "my dear wife," had been omitted in writing over the will, and therefore parol evidence was admitted to explain the ambiguity in the will itself. But the case of *Damer v. Janssen* is principally relied upon to lay a ground for the admission of the present allegation; and it is for the Court to consider whether it goes the whole length; and that cannot be considered without stating that case pretty much at large.

[The Judge then stated circumstantially the allegation in the case of *Damer v. Janssen*.]

This is the case of *Damer v. Janssen*, in which the parties were allowed to go into proof by this Court, and the superior Court, the Court of Delegates. In that case there was shown a clear manifest omission of one entire important clause, and in respect to the construction of which there was not the slightest ambiguity whatever. Even upon the face of the instrument there did appear something of an ambiguity with respect to the contents, for there was a total omission of any disposal of the residue—and a total omission of a provision for one of the deceased's daughters. It should seem, therefore, from the paper itself, that something had been omitted: but still more was there an appearance of an omission when the paper was compared with the former executed will;

because in the former executed will there was a residuary clause, and that residuary clause was in favour of this omitted daughter:—again, the omission yet more strongly appeared, by comparing the will with the instructions for the will, which were found in the *escritoire* of the deceased, inasmuch as there was in those instructions this residuary clause in favour of the youngest daughter; and it was not ticked off in the same manner as the other legacies were, when the draft was copied: therefore, taking those papers together, there was a strong appearance of some omission, as well as some ambiguity, upon the face of the will itself.

In the next place the proof did not depend upon mere parol, but primarily on a paper, namely, the instructions, written by the deceased himself. There was no doubt what he intended by that paper: but the intention of the deceased in respect of the disposition was further supported by circumstances establishing the facts beyond all possibility of doubt, namely, that the eldest daughter had been provided for; that there was a former will leaving the residue to the youngest daughter; that there were instructions to the same purport, these instructions containing the residuary clause, but not in the usual place; that all the legacies were ticked off, but the residue was not. There was also a probability, from the deceased being in haste and ill health, and the paper being *merely* sent to him, when trusting to what was done by his confidential solicitor, the omission might have escaped his notice; the declarations of Mr. Robson, the solicitor, *recenti facto* to his partner Mr. Scrase, and the declarations of the deceased himself at Bath to Mr. Scrase confirmed the whole, and presented such a body of evidence, that the Court might perhaps *safely* under the circumstances of that case admit the extrinsic evidence.

There is also another important distinction, that between the giving of the instructions to Mr. Robson and the execution of the will by the deceased, there were not any intermediate instructions whatever given by him by which he could have directed this omission of the residuary clause. And yet, as I have always understood, notwithstanding all these circumstances, there was considerable hesitation entertained in the first instance, as to the decision upon the point, and whether the Court could admit evidence of such an averment against the execution of the formal instrument; the presumption of law being so strong, as has been already stated, that where a person in full possession of capacity solemnly and formally executes an instrument, he must be presumed, and must be taken, to know the contents and effect of that instrument. The Court in that case did admit evidence. It is the only case which has happened in this Court with which I am acquainted, that at all approaches the present; and the Court is to consider whether it comes up to it.

Now in the case I am here called upon to consider, the very instructions which are attempted to be introduced are in themselves in some degree ambiguous. The instrument which is executed does not appear to be ambiguous. And what the Court also relies upon as distinguishing the one case from the other is, that between the giving of these instructions and the execution of the will here are fresh instructions given, and here is a draft of the will submitted repeatedly to the deceased, and the deceased's attention is very fully drawn to this part of the will. She considers it and reconsiders it, and directs respecting it over and

over and over again; nay, at the very time of the execution of the will, here is in the residuary clause itself an interlineation made in respect of the contingencies upon which Mrs. Fawcett was to take the residue; that interlineation is made both in the will and the duplicate by Mr. Kipling himself; and is noticed by the deceased herself, for the deceased herself applies her initials to it.

How then is it possible that the Court can, with any degree of safety, admit parol evidence, to show that this variation which had taken place between the instructions and the will, supposing any variation to exist (for I am taking the argument in that shape) was not directed by the deceased, or if she did not direct it, that she did not understand and approve it; yet all this is to be established by the recollection of Mr. Kipling to be examined 15 years afterwards. Supposing that the precedent of *Damer v. Janssen* did lay a foundation for the Court to admit proof for the purpose of supplying a clear omission by oversight; yet the circumstances by which that omission was to be established, are so very different in their nature and quality from the present, that it does not form a sufficient precedent. Even that case was considered to have gone to the utmost length to which the Court could go, with any degree of security; and this Court cannot presume to extend it: if it is to be extended, that must be left to the greater authority and wisdom of a superior tribunal. It is much safer for this Court, consisting of a single individual, and acting with all due humility, and diffidence, to adhere to the plain broad landmarks of the law: it rarely happens that a general rule of law is broken in upon for the relief of a particular case, that that breach of the general rule is not found to be afterwards attended with infinite mischief. Here is a will most carefully prepared, most formally executed, not only by a capable, but by a very attentive testatrix; her attention specially directed to this clause, over and over again; and the Court must presume, I think, that the effect which this clause will have, was that effect which the deceased intended it should have,—or at least, that proof to the contrary cannot safely be admitted; I cannot find a sufficient precedent for the admission of parol evidence, under such circumstances; and I think its admission would introduce a most alarming insecurity in the testamentary disposition of all personal property. Upon these grounds, and sincerely hoping that this case may be submitted to the decision of a superior tribunal, (which probably it will from its great importance,) I shall in the first instance think it my duty to reject the allegation.

HIGH COURT OF DELEGATES.

FAWCETT v. JONES, CODRINGTON, and PULTENEY.—p. 490.

(*An Appeal from the Prerogative Court of Canterbury.*)

JUDGES' DELEGATES.—Mr. Justice Lawrence, Mr. Justice Le Blanc, Mr. Baron Wood, Dr. Arnold, Dr. Ogilvie, Dr. Edwards, and Dr. Dodson.

BEFORE the Court proceeded to hear the argument in the grievance,
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the three following articles were tendered as additional to the allegation rejected by the Court below.

First, Whereas, in the *tenth* article of the allegation given in behalf of the said Elizabeth Evelyn Fawcett (formerly Markham) is alleged and pleaded, "That after the two fair copies of the draft of the will had been received by the Lady Bath, she directed an alteration to be made, by extending the bequest of the residue of her personal estate to and for the benefit of the said Elizabeth Evelyn Fawcett, and her issue, to take effect, as well in the event of there being one only daughter, and no other child of the said testatrix, as in the event expressed in the instructions of there being only one son:" and further, "to bequeath the said residuary personal estate, in default of issue of the said Elizabeth Evelyn Fawcett, to an only child of her, the said testatrix, whether son or daughter, in preference to the brothers and sisters of the said Elizabeth Fawcett. Now the party proponent doth allege that the same was pleaded through error and misinformation, at the time, for after two fair copies of the draft of the will had been made for execution (as pleaded in the *ninth* article,) the same were forwarded by John Kipling, or by his clerk, to Lady Bath, at the Countess of Ancram's at Lewbattle Abbey, near Edinburgh, where she was expected to be, but she had in fact quitted that place before the packet containing the two copies of the will arrived; and such packet remained with Lady Ancram unopened, until sent for by the deceased.

Secondly, That on the 20th Sept. 1794, John Kipling being at Overstone, in Northamptonshire, received a letter from Lady Bath, dated from Wansford, 20th Sept., 1794, requesting him to meet her at Northampton, on the evening of that day, on business. That John Kipling accordingly went to Northampton, on the evening of the 20th Sept.; at which time, or on the next morning, Lady Bath gave him verbal instructions and directions to make an alteration in her will, being one of the alterations pleaded and set forth in the *tenth* article; and then he wrote, in pencil, a memorandum in his pocket-book in the words following, *viz.* "Will to be altered eldest son and her brothers and sister; and the party alleges that the deceased had not, at that time, nor did she ever see, the draft of her will, and she had not then received the fair copies of the draft forwarded to her for execution. That she directed John Kipling at this interview, to write to the Countess of Ancram to send him the parcel in which the said copies were enclosed; and the parcel was accordingly returned by Lady Ancram, and received by John Kipling, or his clerk, on the 2d of October following, without having been previously opened; and on the 8th of the same month the said fair copies of the will were, by the direction of John Kipling, delivered to Thomas Bainbridge, then a clerk of John Kipling's, to Christopher Wightman, in order that the alteration so directed by the deceased might be made therein. That such alteration was accordingly made by Christopher Wightman, or his clerk, in the manner pleaded in the *tenth* article of the allegation; and thereupon, in the copying such altered part of the said will, and several of the sheets in each fair copy of the will were on the 13th of Oct. taken therefrom, and four other sheets containing the said alteration were written and substituted in their stead.

Thirdly, That on the 13th Oct. John Kipling being at Overstone, sent a letter to the deceased who was then in London, or soon expected to be, on her way to the continent, wherein, referring to the very alter-

ation pleaded in this and the preceding article, he expressed himself in the words following: "The will and duplicate having been returned by Lady Ancram, the alteration which your Ladyship suggested placing an only child of yours, being a son, after the bequest of the residue to Mrs. Markham and her children, but before Mrs. Markham's brothers and sisters, has been made; and the will and duplicate may be executed whenever it is agreeable to your Ladyship, in the presence of Mr. Bainbridge and two other witnesses. That the two copies of the will altered in manner as pleaded in the preceding article were sent by Mr. Bainbridge to the deceased shortly after the 13th of Oct.; and she, the deceased, had never before seen any copy or draft of the will. That the deceased soon afterwards gave further directions to Mr. Bainbridge, for a further alteration in her will, by making the bequest of the residue of her personal property to Elizabeth E. Fawcett and her issue, to take effect, as well in the event of there being one only daughter, and no other child of her, the said Lady Bath, as in the event of there being one only son, being the other part of the alteration pleaded in the *tenth* article; and the deceased expressed herself desirous that the alteration should be made in great haste, as she was about to depart for the continent; and thereupon the draft of the will was immediately re-delivered by Mr. Bainbridge to Christopher Wightman; and the last mentioned alteration was accordingly made therein in the handwriting of Christopher Wightman, or of his clerk; and in consequence thereof several of the sheets in each fair copy were on the 27th October taken therefrom, and six new sheets containing the last mentioned alterations were written and substituted in lieu thereof; and the fair copies of the will, after being so altered, were on the 27th November delivered by Mr. Bainbridge to the deceased.

Dr. Swabey in support of the additional articles.

Although generally, in an appeal from a grievance, the case is to be heard *ex iisdem actis*, yet this rule is subject to exceptions; and there is no difference whether fresh matter is introduced on the application of the party, or *ex officio*.

There was a case lately in the articles, *Watson v. Fairmouth*, an appeal from the Consistory Court of Exeter, for nullity of marriage by reason of affinity. The citation which was taken out, and the libel which was admitted in the Court below, stated no interest in the party prosecuting the suit. The judge in the Arches' Court, finding upon enquiry that the parties had an interest, gave them leave to plead that interest in the superior Court.

Under the authority of that case we are not precluded from adding those articles to the allegation. Every Court has three modes of dealing with a plea:—First to admit it *modo et forma*,—Secondly, to reject it,—Thirdly, to reform it, or send it back to be reformed.

Sir Arthur Pigott, *contra*.

It is necessary, before we proceed, to understand whether the additional articles can be opened. It is an appeal from a sentence below, and there is obvious danger in admitting this amendment to the allegation which was there debated. The case cited is especially different from this; it was necessary that the party proceeding should have an interest. The ascertaining, therefore, whether there was an interest or not would go to the merits of the case, and be a preliminary step to the discussion of it.

The Court decided to hear only on what was done by the Court below.

Sir Arthur Pigott, Mr. Leach, Dr. Burnaby, and Dr. Daubeny, (counsel for the executors,) and *Sir Samuel Romilly, Dr. Stoddart, and Dr. Jenner,* (counsel for Sir James Pulteney) argued in support of the sentence of the Court below.

Mr. Richards, Dr. Swabey, Dr. Adams, and Mr. Heald, (counsel for Mrs. Fawcett,) *contra.*

Sir Arthur Pigott, and Dr. Burnaby, were heard in reply.

The Court affirmed the sentence of the Court below.

CONSISTORY COURT OF LONDON.

PATRICK v. PATRICK.—p. 496.

The absence of consummation of the marriage no bar to a divorce, on account of the adultery of the wife.

PREROGATIVE COURT OF CANTERBURY.

In the Goods of LAURENCE CRUMP, deceased.—p. 497.

LAURENCE CRUMP died in March, 1801, having made a will, and appointed three executors,—his brother Thomas Crump, (who died in his lifetime,) and John Page, and John Wilmot, who survived him.

The testator by his will bequeathed the residue of his estate and effects to his said executors, in trust to invest the same in their joint names, in the purchase of government securities—to apply the interest and dividends, not exceeding 150*l.* per annum, to the maintenance and education of his daughter, Ann Crump, (then a minor) till she either married or attained her majority; and to invest the surplus, in the interim, in the purchase of the like government securities, to accumulate with, and become part of, the residue. Upon Ann Crump's marrying or attaining her majority, the executors were directed to pay the whole interest of the residuary estate, with the accumulations, to her for her sole and separate use during her life, and the principal at her death to her appointees by deed or will.

In March, 1801, probate was taken by the two surviving executors, who proceeded thereupon to execute the trusts of the will; and, upon Ann Crump's attaining her majority, commenced paying her the whole interest of the residuary property. Ann Crump subsequently married John Bott: but continued to receive the interest and dividends annually, from the various government securities that constituted the residue of Mr. Laurence Crump's estate, up to October 1817.

In November 1817, Mr. Page died, leaving his co-executor Mr. Wilmot still surviving. Mr. Wilmot's state of mind and body had been such from paralytic affection as to render him incapable either of receiving the interest or dividends himself, or of executing the necessary

legal instruments to enable any other person to receive them for him. Mrs. Bott had consequently been precluded from receiving any portion of the interest or dividends on the residuary property for more than three years, there being no sufficient legal representative of Mr. Laurence Crump's estate, by reason of Mr. Wilmot's continued incapacity, who could receive and pay her such interest or dividends.

J. Addams, upon due proof, by affidavit, of the special circumstances proved, applied to the Court to decree administration (with the will annexed) of the goods and chattels of the deceased (limited so far as concerned the right and title of Mrs. Bott to the interest and dividends which had then arisen and become due, or which should thereafter arise and become due, on the several sums invested in different government securities that constituted the residue of the deceased's estate) to Mrs. Bott, for the use and benefit of Mr. Wilmot, the surviving executor and residuary legatee in trust, during his life and incapacity.

Per Curiam.

Administration with the will annexed is prayed on the part of the residuary legatee, and not opposed by the next of kin, to enable him to receive the dividends, during the life and incapacity of Mr. Wilmot, the only surviving executor. No inconvenience can result from the grant. Mrs. Bott has alone a beneficial interest in the property; it will be merely a power to receive the dividends to which she is entitled;—if the authority is not granted, the party has no remedy. The only difficulty is, that the application is rather a novel one. In this case the executor has no beneficial interest; and it is not expected that a committee will be appointed by his family merely to benefit this party.

Upon the whole, I think, I may grant administration with the will annexed as prayed: this is not revoking a former grant supplemental to it, and to carry into effect the real object of the testator's will.

CONSISTORY COURT OF LONDON.

ARKLEY v. ARKLEY.—p. 500.

Cruelty is not a bar to a charge of adultery,—but may be pleaded as introductory to the history of an adulterous intercourse. *7 H. 148*
Ad. 91

THIS was a suit brought by a husband against his wife for a divorce by reason of her adultery. An allegation was now offered on the part of the wife, in which cruelty and adultery were pleaded on the part of the husband.

Swabey and *Lushington*, for the wife.

Jenner, contra.

JUDGMENT.

SIR WILLIAM SCOTT.

The allegation pleads, that after Charlotte Goodwin came to live in their service, the husband began to quarrel with his wife, and so conducted himself towards her as to endanger her life; and that during the confinement of the wife the adulterous intercourse with Charlotte Goodwin commenced.

This is pleaded as introductory to the history, and is not liable to the

objection taken: it shows that the affections of the husband were alienated by the introduction of this woman into the family.—Cruelty is certainly not a bar to adultery: but in this view it is admissible.

The office of the Judge promoted by

LORD VISCOUNT MAYNARD v. BRAND and PHILPOT.—p. 501.

A monition issued against churchwardens to repair and reinstate in its original form the spire of a church which had been destroyed by lightning.

PREROGATIVE COURT OF CANTERBURY.

BAYLE v. MAYNE and LAMBARD.—p. 504.

Allegation, pleading an unfinished and unexecuted paper, rejected.

JUDGMENT.

SIR JOHN NICHOLL.

This is a question respecting a paper propounded as the will of Mrs. Grace Otway. The allegation pleads that the deceased died at Seven Oaks,—that her personal property amounted to 4,000*l.*, and that she had the power of appointment of 4,000*l.* more;—that she left three sisters, and three children of a deceased sister; that she wrote the paper propounded with her own hand;—that it was deposited in a drawer a few days before her illness, and there found at her death.

The first consideration is, whether it is a perfect or an unfinished paper:—it has hardly been maintained that if it is unfinished, the circumstances are sufficient to sustain it; the question has been made whether the deceased intended to do more to give it effect.

The paper has been written at two different times,—the first part relates to her funeral, and the executors.

In a subsequent part, written with ink of a different colour, a legacy is given in trust for her sister to the two executors.—Here she stops, and nothing more is done.

It is hardly possible to consider, that the deceased intended this to be finished:—the first part is as much finished as the second, for there she stops and afterwards writes more:—it is contrary to all reason and experience to suppose that she did not intend to do more;—it is not signed nor dated,—it disposes only of part of her property; it is torn at the bottom in an uneven manner; it may have been written ten years, for the paper bears the water-mark of 1811. Finally, it is thrown into an open drawer; such an instrument cannot be considered as a finished paper.

It is stated in the third article, that she deposited it in an open drawer a short time before her death: this circumstance is pleaded to show that she placed it in the drawer after her return to Seven Oaks. In the beginning of November, she was taken ill, confined to her bedroom, and never came down stairs again:—the conclusion from this fact is the same as from the face of the paper; she puts it in a drawer either with pieces

of tape or with filberts, and in a drawer to which the servants had access;—she either must have considered it as an abandoned paper, or as the inception of a mere memorandum.

My opinion is most decided that she did not consider this as her will, her whole conduct confirms this:—she was down stairs till the 20th of November; she then took to her bed, and since then there has been no reference to this paper. Nothing in any degree tends to confirm the idea, that she considered this as an instrument to operate after her death.

I have no doubt in rejecting this allegation;—it is for the benefit of all parties that I should reject it in the first instance.

ARCHES COURT OF CANTERBURY.

CETTLE v. CETTLE.—p. 507.

7/12. 145.

In a suit for adultery, solicitation of chastity not proved by the adverse party; and if proved might be doubtful whether it could be considered as a bar to a sentence of divorce.

186.94
95.97.

PREROGATIVE COURT OF CANTERBURY.

In the Goods of THOMAS ROBINSON, deceased.—p. 511.

JUDGMENT.

Sir JOHN NICHOLL.

This is an application on the behalf of Richard Robinson, against Barham, the residuary legatee for life, and administratrix with the will annexed, of Eliza Robinson, whilst living the universal legatee and administratrix of Thomas Robinson, to show cause why such administration with the will annexed of Thomas Robinson should not be revoked, and the administration granted to him: in other words, the object is to put her on proof of the will.

This application is founded on an affidavit of Richard Robinson, that he was in New South Wales when the administration was granted; that he did not hear of these proceedings till 1819;—that he arrived in England in December of that year;—was soon afterwards taken ill and unable to make enquiries;—but that he has since made them, and finds sufficient ground for contesting the validity of the will in question;—that Eliza Robinson is since dead;—that her will has been proved;—and he prays that Mrs. Barham may be called upon again to prove the will of Thomas Robinson.

There is no precedent in point to guide the Court with respect to this application: I must look therefore to general principles.

In the original cause a citation *viis et modis* was served at the Exchequer at Hull, where this person had his last residence before he quitted England; and at the house he had occupied in that town, and on the pillars of the Royal Exchange at London. The party, therefore, used all due diligence. There is some difference between this service and a personal service:—a personal service may conclude both the party and the Court; but a service *viis et modis* is a constructive service, and con-

cludes the party, but does not conclude the Court. The Court, on good and sufficient grounds, may open proceedings to get at the substantial justice of the case. What are the grounds which would warrant me in opening the case? If there had been any fraud or contrivance, or collusion, in taking out the process, of course that would be sufficient, for no person should be allowed to take advantage of his own fraud.

It is admitted that the party was at Botany Bay:—but he must show, first, that he was ignorant of the proceedings; secondly, that he has used due diligence since he became acquainted with them; and, thirdly, that he has a *prima facie* case on the merits, and that justice would require the cause to be opened.

463.
24/64. Ignorance of the proceedings he has shown, for he was at Botany Bay when they took place;—he has shown that he came to England with due expedition,—but not that he has used due diligence since his return. He says he was prevented by illness;—the expression, *soon after*, is vague;—again, an illness for several months is unsatisfactory:—it is not set forth to have been such an illness as prevented him from employing a person to make the necessary enquiries:—the fact, however, is, that no notice was given to the other party till the 15th January, 1821, above a year after his return to this country. What happens in the mean time? The executrix under the will administers to all the property, and dies. By her will she disposes of this property; and it has now passed into the hands of third persons, who may be ignorant of all the circumstances relating to the making of this will. I think the complainant is barred by his own wilful negligence; and the Court would run the risk of committing injustice if it allowed him to proceed: but if there was no negligence of this sort, the Court must look at the original case. It was not a mere *ex parte* proceeding; the will was opposed by an uncle and two aunts; the witnesses were cross-examined, and closely; the proof was not merely formal. The plea was more than a common *conduite*; it pleaded affection for the party, and declarations in her favour;—five witnesses were examined;—the proceedings were in *pœnam*;—the evidence, therefore, was necessarily considered, and the proof was so clear and conclusive that the adverse parties and their legal advisers did not employ counsel;—and they judged not unwisely, for the depositions satisfactorily established the case set up.

Against this, the affidavit states “that he has received information from persons of credit who were not examined;”—this is utterly insufficient for the Court to act upon; certainly the Court would always go as far as it has the power, to make the forms of proceeding bend to substantial justice.

Looking at the principles which usually govern this Court, I am satisfied that I ought not to open this cause;—and I reject the present motion.

ARCHES COURT OF CANTERBURY.

PARHAM v. TEMPLAR.—p. 515.

A proceeding against a curate for altering a seat in the body of the church without competent authority.

Error in the institution of the suit. Judgment of court below reversed.

PREROGATIVE COURT OF CANTERBURY.

NATHAN v. MORSE.—p. 529.

HUGH MORSE died on the 12th of August, 1820, while he was in the act of dictating instructions for his will to William Christopher, his solicitor, in the presence of Mr. Isaac Joseph; he had proceeded as far as the clause which contained the appointment of the executor, when he was attacked by the seizure which terminated his existence. Immediately after his death, Mr. Joseph requested Mr. Cappage to read over the instructions to him, which he accordingly did; and then Mr. Joseph observed, that he had omitted a legacy of 1000*l.* 3 per cent. consols, to Elizabeth Nathan, for her own use, independent of her husband, upon which Mr. Cappage, recollecting that the deceased had directed this legacy to be given, immediately, in the presence of Mr. Joseph and another person, who was present, added the legacy which he had omitted.

“Instructions for the will of Hugh Morse, of King Street, Tower Hill, London, furrier, taken this twelfth day of August, 1820. To his mother 1000*l.*, 3 per cent. consols, for her to take the interest for her life; after her death 500*l.* stock, part of this sum, to the children of Elizabeth Nathan, the wife of Lewis Nathan, of Prescott Street, Goodman’s Fields, pen-cutter, that shall be living at the time of his mother’s death, share and share alike, to be paid to them as they respectively attain the age of 21, with benefit of survivorship, the interest to be applied towards their maintenance.

To Catharine Williams, of Blackmoore Street, Clare market, two hundred pounds; and to her five children the sum of 200*l.* each.

To the new synagogue in Leadenhall Street, the sum of 20*l.*

To the Jews’ hospital, Mile end, the sum of 5*l.*

At the death of his mother, the remaining 500*l.* stock, part of the above 1000*l.* stock, to my nieces, the children of my late brother Moses Morse to be equally divided between them.

To his nephew, the son of the late Moses Morse, last named, the sum of 50*l.*

The residue of my estate and effects I give to my executor, to be divided by him amongst the before named children of Elizabeth Nathan, wife of Lewis Nathan.

Isaac Joseph, of Sams Coffee-house, executor.

To his daughter, the before named Elizabeth Nathan, 1000*l.* pounds, three per cent. consols, free and independent of her husband.”

JUDGMENT.

SIR JOHN NICHOLL.

The facts are satisfactorily established. I have no doubt in pronouncing this to be the will of the deceased, as far as to the appointment of the executor: but it is perfectly clear that the other part was not committed to writing during the life of the deceased. Although the Court goes the utmost length to give effect to intention clearly proved, and reduced into writing in the lifetime of the testator, yet it has never held that any thing added to a will after death can be established. Death consummates the instrument;—nothing can be added afterwards.

The last clause must be pronounced against, and struck out of the will.

I have no doubt of pronouncing for the will without it.

The Judge struck out the clause.

KOOYSTRA v. BUYSKES and Others.—p. 531.

If the surviving executor decline to take administration and there is no residuary legatee, the next of kin is entitled to it. If the next of kin decline it, the administration may be granted to a legatee or a creditor; but notice must be given of the application of the legatee or creditor to the next of kin.

MARIA VERBRAGGEN, formerly of Woolwich, in the county of Kent, died at Enkhuysen, in Holland, on the 27th of May, 1791. She, conjointly with her sister Catherine Verbraggen, made and executed two wills; the one a general will, the other limited to her effects in England. In both these instruments, Peter Buyskes, and Arnoldus Buyskes were appointed executors.

In December, 1803, the executors proved the limited will in the Prerogative Court of Canterbury; and on the 25th June, 1805, letters of administration, with both the general and limited will annexed were granted to John Groves, the attorney of the executors, (who were resident at Enkhuysen) limited to the effects in England.

On the death of John Groves in 1805, letters of administration with the wills annexed were granted to John Thomas Groves, as the attorney of the executor, in his stead. John Thomas Groves has since died; and Peter Buyskes, one of the executors, is dead also.

An application was made to the Court on the behalf of Bartholomew Kooystra, for letters of administration, on the following ground, viz. that he was a legatee named in the general will, and also a creditor of the estate of the deceased; and further, that Arnoldus Buyskes, the surviving executor, was resident at Enkhuysen, and not likely soon, if ever, to come to England. That the deceased, by her general will, made jointly with her sister, gave and bequeathed the residue of her property to the children left behind, and the descendants of the late Dame Petronella Verbraggen, and the children left behind by the Honourable Jan Lambertus Appelnar whilst living, member of the council, and burgomaster of Enkhuysen. That diligent inquiry has been made after the person or persons entitled to the residue under the will. That advertisements had been inserted in the Courier newspaper in England, and the Dutch newspapers called the Amsterdam Courant, and Haarlem Courant, which advertisements contained a notice of the residuary bequest in the will.

A decree has issued with usual intimation, under seal of the Court, against Arnoldus Buyskes, and also the person or persons who might be entitled to the residue of the estate and effects of the deceased; and the customary proceedings being made, the decree with affidavits of the due service of it, was returned into Court; and the Court was moved to grant the letters of administration to Bartholomew Kooystra, no appearance having been given for any of the parties cited.

Per Curiam.

You have given no notice to the next of kin; they are entitled, if there are no residuary legatees. They certainly ought to have had no-

tice:—in foreign property of this description, the Court cannot be too cautious in adhering to the principles of its practice.

If the surviving executor on notice declines to take the administration, there is an end to his claim: then you must go to the residuary legatee; and if there is no residuary legatee, to the next of kin.

I shall direct it to stand over till the next Court day, see what the difficulties are, and consider with the Registrar how they may be avoided.

The motion was repeated, and the administration granted to Bartholomew Kooystra.

CONSISTORY COURT OF LONDON.

TURNER v. GIRAUD.—p. 534.

Answers to a libel in a pew-cause directed to be reformed.

ARCHES COURT OF CANTERBURY.

TOCKER v. AYRE.—p. 539.

In a defamation suit the testimony of two affirmative witnesses outweighs that of several negative ones.

PREROGATIVE COURT OF CANTERBURY.

WILSON v. WILSON and Others.—p. 543.

Where a later will has been destroyed and a former will left uncanceled, it has been a point much controverted whether the former will revives or not: it is a question of intention, and the intention must be collected from all the circumstances of the case. In the Ecclesiastical Court the *prima facie* of presumption seems to be against the revival.

HENRY CLARKE died on the 31st of December, 1820, aged upwards of eighty-three years. He had been in good health up to the 5th of December, when he was seized with a paralytic attack, which so much affected his speech that he was never afterwards able to articulate distinctly.

On the 15th of June, 1811, he executed his will in two parts; the one was very nearly, but not exactly, a duplicate of the other. To the one a codicil was annexed, dated the 8th of July, 1816; to the other a codicil dated 22d of July, 1812;—towards the end of 1816, he cancelled that part of the will to which the codicil of 1812 was annexed.

In 1817 he executed another will at the office of Messrs. Wilson, in Aldermanbury, which was attested by two clerks of the house, and

which he carried away with him. After his death, inquiry and search were made for this will without effect. The uncanceled part of the will of 1811, and the codicil of the 12th July, 1816, were found in a tin box, in which he kept his papers of consequence: but the string which had fastened the sheets together (there were five sheets) was untied, and the several sheets were scattered about the box. The cancelled part of the will, and the codicil annexed to it, and several wills and testamentary scripts were found also in the same box.

The personal property amounted to nearly 60,000*l*.

The uncanceled will of 1811, and the codicil of the 8th July, 1816, were propounded by Mr. Wilson, the executor, and opposed by the next of kin. The facts of the case were admitted in the answers of the parties contesting the suit, so that no witnesses were examined.

Lushington and *Dodson* argued in support of the will.

Adams and *Phillimore* for an intestacy.

The Court took time to deliberate.

JUDGMENT.

SIR JOHN NICHOLL.

In this case the Court has taken time to consider the arguments which have been urged in the course of the hearing; and it has taken the opportunity of again carefully inspecting all the testamentary papers which have been laid before it. It has done so, not from any great doubt affecting its own mind, but for the satisfaction of the parties concerned, the property at stake being of great magnitude; and after the best and most mature consideration which I have been able to give to the subject, the impression which was left on my mind, as formed originally upon the result of this case, has been confirmed and strengthened by a subsequent consideration of it.

The case comes on for hearing, amicably, between the parties, and on pleas given in upon both sides, and on answers taken to those pleas: but no witnesses have been examined on either side; there is, therefore, no conflicting evidence with respect to the facts of this case. The party deceased was a Mr. Henry Clarke, who died at a very advanced age upon the 31st of last December. About twenty-five days before his death, he was struck with palsy; and from the effects of that attack he never afterwards became so recovered as to be of testamentary capacity. He left behind him a (a) brother and a sister, and the son of a deceased brother, and seven children of a deceased sister, who will be entitled in distribution, in case it shall be determined that the deceased is dead intestate. The amount of his property, (all personalty) is stated to be from fifty to sixty thousand pounds. The deceased made several wills; one of them appears to have been made in the year one thousand seven hundred and ninety-seven, and has a codicil, dated (I think) in one thousand eight hundred and two; another will is dated in one thousand eight hundred and seven; another in one thousand eight hundred and eleven; and there was another will in one thousand eight hundred and

(a) Mr. William Clarke, his brother; Mrs. Hannah Wilson, widow, his sister; the Rev. Robert Clarke, the son of Rev. Slougher Clarke deceased, the deceased's brother; and Henry William Gordon, Augusta Maria Halce, widow, Charlotte Matilda Shire, widow, Henrietta Augusta Gwynne (wife of the Rev. William Gwynne), and Anna Maria Wallinger (wife of Mr. Joseph Wallinger), the children of Anna Maria Gordon, deceased, a sister of the deceased's.

seventeen. The writing of these several testamentary instruments by the deceased himself, and his testamentary capacity at the several times of writing them, are fully admitted. These several papers (except the will of one thousand eight hundred and seventeen) together with several abstracts of them, or lists of legacies taken from them, and old cancelled wills, were found after the deceased's death in a tin box in his house. Three other papers of a testamentary nature, which are marked O, P, and Q, are, I think, duplicates of old wills; and were delivered by the deceased into the possession of Mr. Wilson, to be deposited in an iron safe in his house in Aldermanbury; and there they remained till after the deceased's death. The will of one thousand eight hundred and seventeen was not found after the deceased's death: but it is admitted that he executed such a will. The answers state *that "the said deceased on or about the month of June, in the year one thousand eight hundred and seventeen, called at the counting house of the respondent with whom he had many years before deposited several of his former testamentary papers, and at such time did produce to the respondent, in presence of his late partner, Thomas Watson, and his clerks, a paper purporting to be a will, which he brought with him for the purpose of being executed; and that he thereafter executed his said will in the presence of Thomas Watson and his clerks, two of whom James Rixan Oliver and Henry Watson, respectively signed their hands thereto."*

He also admits that the said Thomas Watson, his late partner, was in the latter end of the year 1816, and during the greater part of 1817, in an ill state of health; and that he died in the latter end of the year 1817. The execution, therefore, of this will of 1817, in the month of June in that year, is very clearly and distinctly admitted. The paper propounded is that which is marked with the letter A.; it is signed by the deceased, and is dated June 15th, 1811—the same date with another cancelled will, which is marked B. It is the paper propounded by Mr. Wilson, one of the executors named in it; and it is opposed by the next of kin who maintain that the deceased is dead intestate.

For the more clearly understanding of this case, it may be proper thus to describe the several testamentary papers which are before the Court; or rather, perhaps, the state in which they are.

The will of 1797, with a codicil of 1802, which is marked E, is crossed through; and there is a memorandum at the end of it, in the deceased's handwriting "expunged the whole of this will, July, 1807." The will of 1807 is marked C.: that instrument is executed in the presence of two witnesses; it is contained in five sheets of paper, and appears to have been carefully cancelled when the deceased executed a subsequent will, in 1811. There is this memorandum on it, *cancelled this will when I executed another dated the 15th June, 1811; the same being entirely written by myself, and subscribed as witnesses to the same Mr. Joseph Yellowly and Nathaniel Clarke."*

Q. is an authenticated copy of the will of 1807; and was one of the papers which were deposited in the iron chest in Aldermanbury. So that from hence it appears that when the deceased executed the will of 1807, he cancelled that of 1797; and again, when he executed the will of 1811, he cancelled that of 1807.

A. and B., as I have already mentioned, are both dated on the 15th June, 1811: but from internal circumstances in paper A., which were

pointed out in the course of the argument, it seems to have been originally written before paper B. Paper A. is not cancelled: but the sheets that had been apparently attached together by a tape were found detached and separate from each other, though folded up together. In the margin of A. there is an abstract of the different legacies which are contained in it; and there are some notes also and explanatory observations, with respect to certain alterations in the body of the paper itself. There are besides, several alterations and interlineations both in the body and towards the conclusion of this paper, mentioning the number of sheets it contained, which number appears to have been altered twice; first, from four to five, and then back again to four. So that paper A. appears to have contained, at different times, a different number of sheets. The first sheet, as it is at present introduced into the paper, has every appearance of not having been originally the first sheet: but it seems to have been since substituted.

In a blank sheet at the end of paper A. is a codicil revoking a legacy, which had been previously revoked in the third sheet of A., by a marginal note. It is a legacy of 50*l.* to a female servant. That codicil is dated 8th July, 1816.

There is a similar revocation in paper B., and contained in almost the same words; that is dated in 1811. In addition, there is an explanatory note, written by the deceased, stating, that he had very fully revoked such legacy. He says, "I consider I have expressed myself clearly, that the share of 200*l.* left to her husband, of which one moiety is my property, is not to be considered as a legacy to either of them," (meaning the husband or the wife.) There is no date to this note. Now this writing on the blank sheet at the end of paper A., dated the 8th of July, 1816, is the latest date upon the instrument itself. But at what time it was that the several sheets of paper A. were disconnected from each other, or when the new sheet was first written or substituted in that paper; or when these marginal abstracts and observations were made,—there is no satisfactory proof to show. These facts must be matter of conjecture; and I think, of conjecture only. Paper B. is of the same date as A. originally; and though written afterwards, in the first instance, and probably then only in substance a duplicate of the other; yet I think it had originally this important difference from A., that in paper B., the residue is given solely to Mr. Sloughter Clarke; and in paper A. the residue is given jointly to him and his brother William. In case of their death, in the lifetime of the testator, the residue is given to the son of Mr. Sloughter Clarke as the substituted residuary legatee.

How these important differences arose originally between these two instruments, and why both of them are of the same dates, it is impossible for us now to conjecture. The deceased was certainly a very old man; aged, I think, nearly eighty years. They might be perhaps owing to some accident, or they might be occasioned by some oversight on his part. There is abundant evidence to show, that paper B. was written after paper A., as I have said. Paper B. is carefully cancelled;—at least the first, fourth, and fifth sheets are carefully cancelled. The second and third sheets do not appear. They have been destroyed; and it must be presumed that they have been destroyed by himself. The time at which this act of cancellation of paper B. took place does not perfectly appear; and, in the absence of sufficient evidence, it would be in vain even to conjecture in respect to that fact. Possibly it might have

been at the time when the deceased executed the will of 1817. It might however, for aught that appears to the contrary, have been at any other time. Upon the back of it there is a written memorandum: but that equally leaves the time unascertained. That memorandum is in these words, "*These five sheets or four, as entered as parts of my will, are marked with my signature, taken off by myself; reserving only to direct an alteration to any future legacy I may think of.*"

To this memorandum there is no date; and, therefore, it is not known when the act of cancellation took place.

Now what might be the effect of this cancellation, if there had been no subsequent will executed, seems quite unnecessary to decide, because there is a subsequent will executed, which I think places the thing quite sufficiently before the Court, for its decision; for that subsequent will of 1817 revoked both these papers A. and B.

Then the question comes, whether paper A. has been subsequently revived in any way whatever?

The execution I have mentioned of the will of 1817, in its force and effect, so long as it continues in existence, is a clear and distinct revocation of the paper A. The revocation of paper A., therefore, is not a matter of doubt, but of clear intention; and if that observation required to be strengthened by any other remarks, they might be easily found. But this execution of the will of 1817 is not done hastily, and as a transient intention: but deliberately and formally. He did not even rely on his own handwriting in the body of the paper, and his signature of the instrument, in order to give effect to that will of 1817, as he had before to the will of 1811. But he carried it to Mr. Wilson's, to execute it there in the presence of two witnesses; and they attested the act. If, then, the former will of 1811 had been executed in a manner equally regular; if it had remained in the most perfect state, instead of being pulled to pieces and altered and abridged in the margin, and interlined, as it now appears to have been;—it would still be completely revoked, so long as the subsequent will continued to exist. So long as that continued to exist, the intention of the testator to revoke the former will now propounded was by no means equivocal or doubtful; but perfectly distinct and decided. But this will of 1817 is not forthcoming. It was not found upon the deceased's death; and from the circumstance of its never having been traced into any other hands but the last that we hear of it being in, that the deceased immediately upon its execution, put it in his pocket, and took it away with him, it must have been destroyed, (it is to be presumed,) by the deceased himself.

Now, of the time of its destruction there is not the least evidence whatever. Whether it was on the day after the will was made, or on the day after the deceased's incapacity commenced, or at any intermediate time between the one and the other of those events, there is nothing before the Court to show. The time must be mere matter of conjecture. We have no declaration coming from the deceased himself upon the subject. We have no fact from which the time of such destruction is necessarily to be inferred. Mr. Watson, who was interested in that will, and who was probably one of the executors named in it, (for he was an executor under the former will,) dies in the latter end of 1817. It may possibly, but not very probably, be that the deceased destroyed the will upon that event happening. I say it is possible, but not very probable; because, at the time when deceased executed the

former will, it clearly appears from his own handwriting that Mr. Watson was in a bad state of health; and the deceased himself mentions that probably that gentleman's life was no better worth than his own. It is not, therefore, very probable, I think, that the event of Mr. Watson's death should have induced the destruction of the will of 1817. Who was the residuary legatee named in the will of 1817 is not directly proved. The brother, Mr. Slougher Clarke, was the sole residuary legatee in paper B., which, as I have before remarked, was originally written subsequently to A. In paper A., also, he was named joint residuary legatee. Both these instruments are dated in June, 1811. Therefore it is to be presumed that he was interested in the residue of the will of 1817. It is stated that he died in April, 1820. That event, added to the death of one of the executors, (Mr. Watson,) which I have already mentioned, is not unlikely to have induced the destruction of this will by the deceased. But I state this of course as mere conjecture. It is not a fact upon which the Court is warranted in relying. The only fact is, that the will of 1817 not being forthcoming, it must be presumed to have been destroyed by the deceased. Then comes the consideration of what is the legal effect of that fact?

Is it to set up this paper A., which in its original state may not have been considered at all as his will, but was meant perhaps as a sketch of the will which was executed on the fifteenth of June, 1811, B. being more formal than A., and in its altered state may have been only used as the draft for the will of 1817.

Whether, by the destruction of that will of 1817 and other circumstances, this paper A. be revived or not, is the question which this Court has now to decide.

Now the legal presumption as to whether, by the destruction of a later will, the revival of a former uncanceled will is to be presumed, is a point that has been much controverted, but never very clearly settled. And perhaps the bare legal presumption upon such a case is not very material to be discussed. In the case of *Glazier and Glazier*, 4 Burr. 2512, so far as respects the disposition of lands, Lord Mansfield is reported to have said that the former will is revived. But the correctness of that report and the soundness of the doctrine there laid down have been a good deal questioned. In these Courts, as applies to wills respecting personalty, the presumption has been rather the other way, and against the revival of the former testament; it has been held that it requires some act to show an intention of such revival. As far as my own opinion goes, I cannot help saying that good sense and the reason of the thing seem rather to favour the presumption as taken in these Courts. But the truth is, that in all these matters the legal presumption must grow out of something in evidence before the Court;—and in fact a case can hardly by possibility be so destitute of all circumstances as to require a decision upon mere legal presumption, and nothing else. In the case of *Moore and Delatorre*, ante, p. 109, before the High Court of Delegates, I understand it was clearly held by that Court, that whichever way the presumption of revival might be, still the intention was to be collected from all the circumstances of the case.

Now, if the Court is to collect the intention in the present instance from all the circumstances of the case, the intention to revoke this will, and the subsequent actual revocation of it by the will of 1817, being quite clear and unequivocal;—the contrary intention to *revive* it remains

to be shown, as growing out of all the circumstances. Here, however, the intention to revive it is not supplied either by the paper itself, or by any parol declaration made by the deceased, or by any change in the condition of this party. If such intention is to be collected at all, it can only be collected in some of those other papers which were found in the deceased's possession. On the face of the instrument itself nothing appears;—there is no memorandum, no recognition of it in any way subsequent to June, 1816;—the subsequent will being, as we have seen, executed in June, 1817.

The other papers before the Court were found in company with this instrument in the deceased's tin-box. It was the habit of the deceased to make abstracts of his testamentary papers: these are lists of the legacies, for the most part, contained in the testamentary papers. He also had the habit of keeping old cancelled wills in his possession. There are a variety of them before the Court:—but when some of them were written,—how many times they have been altered and added to,—and from what papers some of them have been extracted, must be almost entirely matters of conjecture.

The papers F. and L. are abstracts of the will of 1807; and M. seems to be no more than a list of the legacies, placed in different columns. Whether they are legacies of that will, or of any other will, it is perhaps not very material to know.

Paper D. is headed "legacies in my will dated the 15th June, 1811." That is written on the back of an old letter, and is on paper with the water-mark of 1810.

Paper I. is of the same description. It is an abstract of the will of 1811, is on an old letter, and on paper also with the water-mark of 1810.

Paper K. is another abstract of the will of 1811; but the water-mark on that paper is 1815.

Paper G. is also written upon the back of an old letter: but that letter is dated on the 3d July, 1816. A part of it is described "Extract of legacies in my will, dated June, 1811." That applies to the first and second columns. The third column and the fourth column are described, "Money devised by my will; trust-money in the funds devised." These two columns are dated in 1818.

In paper A. is an inquiry whether the deceased could alter the residuary bequests of his will by a codicil?—whether there had not lapsed a sum of 500*l.* Reduced to Mr. H. Gorden, who appears to be a legatee in 1,500*l.* by the will;—and the form of revoking such legacy is drawn at the end of the paper. But there is nothing to fix the date as to when this was written.

These are the several abstracts; and two of them, G. and H., have been particularly relied on. The fourth column of paper G., which I have already mentioned, and which, folding back the letter, was perhaps the first part that was written of it, is intitled, "Extracts of my will (dated) in 1811." Hence, it is probable that it was written some time subsequently to July, 1816. For what purpose this paper was written must, like many other circumstances in this case, remain mere matter of conjecture. Whether it was preparatory to the new first sheet of paper A., or preparatory to a new will, or whether this first sheet in paper A. was preparatory to the new will of 1817, does not satisfactorily appear. But it does clearly appear that the second and fourth columns of paper G. were written before the first sheet of paper A.; and were originally an

abstract of the first sheet of paper B., and possibly also of the first sheet of paper A.; because, perhaps, the first sheets of A. and B. were originally the same. The legacies are the same as in B., the cancelled paper: but they were afterwards altered, and made the same as they subsequently stand in paper A. For example: the first and second legacy are the same in both;—he leaves one thousand pounds to his brother W. Clarke, and ten thousand pounds, three per cent. Reduced Annuities, to his brother Mr. Sloughter Clarke. These are the same in both papers; in papers A. and B., and in the abstract. The third legacy is a legacy to his sister, Mrs. Wilson; the interest of 2,000*l.*, and, after her death, the principal to her sons. Now in paper B., that stands 5,000*l.*; so too it was originally in paper G. It is, however, in this abstract G., altered from 5,000*l.* to 2,000*l.*; and now, in the first sheet of paper A., it is restored to 2,000*l.*; so that paper G. is originally an abstract of paper B.;—it is then altered, and after that paper A. is made.

The same observation applies to the new legacy,—that to Mrs. Remington. In B. it is 500*l.*; in this abstract it was 500*l.*: but it is now altered in this abstract to 300*l.*;—and in the first sheet of A. it is 300*l.*

The next legacy in this abstract is that to his nephew Mr. Samuel Clarke, of 2500*l.* Navy 5 per Cents. That does not occur as the next legacy in the new paper A.: but there is an intermediate legacy. There are two money-legacies of 1,000*l.* to each of his two nephews, H. Wilson and W. Wilson: and these two intermediate legacies, which are to be found in the first sheet of paper A., are added at the end of this paper in a different ink and handwriting. This confirms my supposition, that the abstract G. is not made from paper A., but made before it, and that A. was made from this. But this is more decisive with respect to the fifth sheet of paper A. In paper B. (the original paper) there is 1,500*l.* given to H. and W. Wilson, in trust for their sister Harriet Newbury. In paper G. that stood originally in the same way: then that is bracketed;—there is written opposite, “lapsed:” (I suppose Mrs. Newbury died in the mean time.) It is then interlined, “to her son Christopher Newbury, 500*l.*;”—this is just as it originally stood in paper B. But subsequently to this, paper A. was written; because there it stands only 500*l.* to Christopher Newbury.

These six legacies were contained originally in the first sheet of paper B.:—that contains the whole of them; but it is not an abstract of the first sheet of paper A. On the contrary, this abstract shows that it was made preparatory to the new sheet, which has been made and substituted for paper A.

Other observations arise which tend only to confirm the fact that paper B. was first written: then G. is an abstract from that. Paper A., I should premise, is the first written of the whole:—then paper B. is written and executed. Both are dated in June, 1811. Then in 1816 the third and fourth columns of paper C. were abstracted either from paper A. or paper B. (if they were both the same at this time) and after this the first sheet of paper A. was added. If the Court were to indulge in conjectures, I should say that the most probable conjecture is, that this new first sheet was substituted at the time for the purpose of making preparation for that new will which was in part executed in the year 1817.

There is nothing to show that the instrument A. was ever used after the execution of this will of 1817;—for if paper A. was the draft of this

new will, why then an abstract made in the year 1817 would more probably be the abstract from that new will of 1817. If transposing the draft for taking that new will, (which to a person of eighty years of age was no doubt a matter of considerable difficulty, and required considerable time to effect,) the leaving the date of this paper unaltered are all consistent with the several heads for the draft of this new will of 1817: if the Court could assume this to be the fact, there is an end of all doubt upon the case. For no one would conclude that a testator destroying an executed will could by that act revive the mere draft of that will.

The other columns of paper G., I mean the first and second columns, have at the top of them the date 1818. Whether these are copied from an original paper of that date or not we have no satisfactory proof.

Paper H., which is partly only a duplicate of G., has the date of June, 1818, written at the top of it. "Extracts from my will dated June, 1818." But there is nothing to prove that they are not extracts of the will of 1817. There is nothing to show that the will of 1817 was not in the legacies, or in most of them at least, conformable to the will of 1811. Even paper H., though it has some of the legacies omitted, possibly is also made from the wills of 1817; and for this reason, because the revoked and lapsed legacies, which are contained in paper A. are not included either in the first or second columns of paper G. or paper H. For example,—there is the legacy to Octavius (Clarke); that is not inserted in these abstracts, but it remains in paper A. The legacy to Mrs. Snarey is not to be found in this abstract. The bequest of the shipping to Mr. Wilson is not contained in it. The legacy to Mr. Dare is lapsed. The bequest of Saxon's debt is omitted. Now all these circumstances, (as far as they make something of probability,) tend rather to show that this abstract, dated 1818, was made from the will of 1817, and not from the old will of 1811.

If so, (if that be probable) this abstract will not tend, in the slightest degree, to show any intention to revive paper A. after the destruction of the will of 1817. It will only tend to this inference; that the will of 1817 was not destroyed till after these two abstracts G. and H. were written.

It is observable that in neither of these papers G. nor H., where they have the date "1818," affixed to them (for it is pretty satisfactorily shown, I think, that the third column of paper G. was written before paper A. was altered) there is no mention whatever of who are the residuary legatees; and we have no evidence as to who was the residuary legatee appointed in the will of 1817.

Indeed it is evident that the mind of the deceased, at various times, fluctuated as to the disposition of the residue of his property. By the will of 1797, which is marked E., the brother, William Clarke, is the sole residuary legatee. In the will of 1807, the brother William, and the nephews Henry William, William, and Robert Clarke, are all four of them jointly declared to be such legatees.

In the will of 1811 paper A., which was first written, the brothers William Clarke and Sloughter Clarke are jointly residuary legatees. And in case of their death in the lifetime of the testator, the son of Mr. Sloughter Clarke (W. W. Clarke) is substituted as residuary legatee. In the will of 1811, marked B., which is more formally written than paper A., the brother, Mr. Sloughter Clarke, is the sole residuary legatee. When that will was cancelled, there is, as I have before said,

no proof: he might have left it uncanceled till he had formed a draft for the will of 1817; and even till after he had executed that will. For here is, in his own handwriting, an inquiry whether he could alter the residuary disposition of his property by a codicil;—it does not appear when that codicil was written, however. Surely then it would require very satisfactory proof indeed, to show an intention on the part of the deceased to revive this important part of paper A. (as to the residuary disposition intended by him to be made:) which, by the death of Mr. Sloughter Clarke, will vest solely in Mr. William Clarke.

It is quite impossible to say what the purpose was, for which the papers with the mark of G. and H. were written. Still less can we say, that they were written after the will of 1817; and consider paper A. as his operative instrument. All these markings and crossings off, and additional legacies of paper G., (for there is an entire column in paper G. tending to show that it was meant to alter the legacies of the will of 1817); all these, I say, might be preparatory to a new will made in 1819; and if, by what there is in the lower part of the same paper, he meant to see what his property was, it might be for a new will to be made in 1820, after the death of his brother, Mr. Sloughter Clarke, who was deeply interested in the will of 1817; or possibly the deceased, who was very far advanced in life, might find the arrangement of his large property so difficult, that he destroyed the will of 1817, and determined to let the law take its course in distributing his property among his family. True it is, that all this is conjecture: but we have nothing else left to guide us here; and I only mention this to show how dangerous it would be to carry it any further. There being, then, no direct act of revival of paper A., either on the face of the instrument itself, or in any other document before the Court, that comes before it from under the hands of the deceased himself; I am next to inquire, “whether there be any intrinsic circumstances in this case that show he intended to revive and set up this will of 1811.”

So far from it, the few circumstances that do arise bear just the contrary inference.

There is not the slightest change of condition on the part of the deceased, tending to show that he meant on that account to revive this paper of 1811. A circumstance of much consequence where the intention to revive a former will may be inferred from the latter will. Suppose that a person had made a will in favour of a wife; or in favour of one of his children in preference to the others, giving a large proportion to such wife or child of his property. Suppose he makes a subsequent will on some sudden anger or passion, that subsequent one cutting off his wife or child; and say that almost immediately afterwards he should be reconciled to them, and the subsequent will should be destroyed,—the former one remaining uncanceled;—and that for the remainder of his life the testator lives in entire harmony with the wife or child. Why facts of this sort would leave no doubt in the mind of the Court that the deceased considered his former will to be revived, and looked upon it as operative for the remainder of his life.

But here this will of 1817 is a deliberate act, more so than ordinary. That will the deceased had executed in the presence of witnesses. But he had not executed the paper of 1811 in the presence of witnesses. Why he destroyed the will of 1811 does not appear. This instrument of 1811, paper A., (if, indeed, it was not intended for the copy of a former will,

or for the mere will of 1817,) is not left in any formal state, but just the reverse. The sheets are disconnected one from the other. It is left with marginal notes and alterations. One of the legatees is dead. One of the executors is also dead. The most important person connected with the document,—Mr. Slougher Clarke is dead. He was the residuary legatee; and by his death the whole of this residue would go to his brother, Mr. W. Clarke. From the circumstance of Mr. Slougher Clarke's being joint residuary legatee in paper B., and his son being appointed to succeed him in the event of his death, during the testator's lifetime, it would seem that that was the favoured branch of the family.

Under all these circumstances, to suppose that the deceased meant to revive this instrument, (paper A.,) and intended these sheets of paper, without any alteration, to operate as his will, really appears to me to be the very height of improbability.

It is said that the deceased intended to die intestate; and so he did, for several years, for a very considerable portion of his life. But it is mere conjecture that he did so after the destruction of his will of 1817; and more particularly, after the death of his brother, Mr. Slougher Clarke. But the question for the Court is not, whether he intended to die testate or not; but whether he meant to revive this instrument which is now propounded.

If he did not intend to revive it, there being no valid will,—the law makes him dead intestate. Now from all the circumstances of this case, (which I have alluded to, with considerable minuteness, rather for the satisfaction of the parties concerned, than as thinking that the case itself is fraught with that degree of doubt and uncertainty which should make so minute a recapitulation necessary,) I am by no means satisfied that it was the intention of the deceased to revive his will.

On the contrary, I think that the deceased did not intend this paper to operate as his will at all, and that I am bound to pronounce against it;—and that, so far as appears to this Court, it was his intention to die intestate.

ARCHES COURT OF CANTERBURY.

The Office of the Judge promoted by ROSE v. LEE.—p. 566.

By Letters of Request from the Rector of Lincoln College in the University of Oxford.

Letters of request from the rector of Lincoln College, in the University of Oxford, rejected; there being no sufficient proof that the rector of Lincoln College was entitled to exercise peculiar jurisdiction in the parish of Long Coombe within the diocese of Oxford.

PREROGATIVE COURT OF CANTERBURY.

JACKSON and WALLINGTON v. WHITEHEAD.—p. 577.

An executor, who had taken the oath of office and given an appearance, in a suit touching the validity of the will, allowed to be dismissed, in order that he might renounce probate, and become a witness in the cause.

ANN WHITEHEAD died on the 19th of January 1821, leaving a will in which the Rev. Thomas Jackson and Algernon Wallington were nominated executors. On the 1st of February following Mr. Jackson and Mr. Wallington took the usual oaths, as executors: but before the probate passed the seal a caveat was entered; and on the 16th of February, an appearance was given for John Whitehead, a nephew and one of the next of kin of the deceased, who instituted proceedings to contest the validity of the will. On the 1st of March the executors were sworn to an affidavit of scripts; and shortly afterwards Mr. Wallington signified his intention of renouncing the probate and execution of the will, and releasing a legacy bequeathed by it, in order that he might become a witness in the cause.(a)

JUDGMENT.

Sir JOHN NICHOLL.

The executors were sworn, and the probate was afterwards stopped by a caveat; after that, an appearance was given for the executors, and after that an application was made to dismiss one of the executors, in order that he might be examined. He is stated to be a material witness in the cause, as he received instructions from the deceased for the making of the will, and was present at the execution of it.

It is not to be denied, that in a great variety of cases, executors have been dismissed after proceedings have been had: but it is said that he has appeared in the cause as a party, and also been sworn as an executor; and these circumstances are considered as precluding him.

I have looked through a great variety of cases, and have not found any one in which the circumstance of a person having been sworn as an executor has ever been that on which the Court has refused to allow him to renounce, nor has it ever been made a material ground.

The only authority in any point is that in 1 Ventris, 335. We well know that a single case connected with proceedings in this Court, reported so incorrectly as it seems to be, cannot be safely relied upon; and at most it only decides that a voluntary renunciation is not so binding as to exclude an executor from the duties of the executorship. Another question is, whether, if he be dismissed, his evidence could be received. After looking through a great number of cases, I find none where the Court has refused to dismiss, except on the ground of the party having intermeddled with the effects. The reason for this is obvious—that where a party has intermeddled,—he has taken upon himself the burthen, and acquired the responsibility of an executor,—that was the principle of the decision in *Haywood v. Bridges*, Prerog. 1767.

(a) It was contended that having taken the oath of office, and given an appearance in the cause, it was not competent to the executor now to renounce the probate and execution of the will.

I think if he has not taken upon himself this burthen, the Court has authority to dismiss him. No injury can be derived to the adverse party from the want of his answers, because he may be cross-examined;—his knowledge of the transaction may be sifted to the uttermost. On the other hand, a great injury might accrue to the other parties, who may be legatees, if this evidence be excluded. Innocent third parties may lose the whole benefit of their legacies; and the intention of the deceased may be defeated because the executor, before he knew of the caveat, had taken the oath of office. This would be great injury and injustice:—and finding no ground on which an executor has been excluded from renouncing, except that of having intermeddled with the effects, which is not suggested in this instance, I am of opinion that Mr. Wallington is entitled to be dismissed. 4. J8

CONSISTORY COURT OF LONDON.

DIDDEAR, falsely called FAWCIT, otherwise SAVILL v. FAUCIT.—p. 580.

Nullity of marriage by reason of false publication of banns, not established.

PREROGATIVE COURT OF CANTERBURY.

THOMPSON v. WALDRAM.—p. 584.

A party benefited under a former will, which does not appear, cannot be admitted a contradicter to a subsisting will.

JUDGMENT.

Sir JOHN NICHOLL.

The deceased is stated to have made two wills; and that Mr. Thompson was executor under one, and Mr. Nias under the other. The former will is not found: but it is alleged to have been in existence, and the executor producing a draft of it, prays to be admitted a contradicter to the latter will without propounding the first.

The will not being forthcoming, the presumption is that it was destroyed by the deceased;—and a party under a former destroyed will is not at liberty to put a party on proof of a latter will, without offering an admissible allegation; if he denies the existence of the former will, the executor is bound to go on *pari passu*.

What are the circumstances brought forward in this affidavit? He has heard and believes the will was destroyed after the death of the testator; not a word by whom or when. On a further affidavit by Mr. Nias, he says, he has heard it was in the possession of the deceased uncanceled and unrevoked, (if twenty witnesses were to state this it would be no evidence of the fact,) and that she deposited it with the plate and other articles in a certain box in her bedchamber. Non constat, that he was told all this by Mr. Thompson: and if all this was re-

duced into an allegation, the Court could not receive it. I think this affidavit does not propound a statement which justifies this proceeding.

On the other hand, there is an affidavit of persons speaking from their own knowledge, which repels all presumption of the will having been destroyed by any one but the deceased; particularly the affidavit of Brett, who was the subscribing witness under both wills.

No ground is laid for this application:—if any person benefited by a former will is to be allowed to put an executor on proof of an existing will, a door would be opened to very vexatious litigation.

I cannot admit this party to be a contradicter.

CONSISTORY COURT OF LONDON.

The MARCHIONESS v. The MARQUIS of DONEGAL v. CHICHESTER.—p. 586.

Not competent to a party called upon to see proceedings in a marriage suit, to object to the jurisdiction, on the ground that the party proceeded against has been unduly cited.

PREROGATIVE COURT OF CANTERBURY.

FORBES v. GORDON.—p. 614.

Imperfect papers established as codicils to a regularly executed will.

An allegation was given in on the part of Charles Forbes, Esq., the executor under the last will and testament of his uncle John Forbes, Esq. of New, in the county of Aberdeen, and of Fitzroy Square, in the county of Middlesex, which pleaded the following facts:—

First, That John Forbes, Esq. the testator in this cause deceased, having on the 2d of May, 1820, made and duly executed his last will and testament in writing, did immediately after the execution thereof inquire of his solicitor, Mr. Julius Hutchinson, by whom the will had been prepared, whether any particular form of words would be requisite for the purpose of bequeathing legacies to relatives or friends:—and upon being answered in the negative, so far as regarded absolute pecuniary bequests, he the said deceased then expressed his intention to make himself, at a future time, a codicil containing bequests of that description. And that on or about the twelfth day of June, 1821, the said John Forbes called upon the said Julius Hutchinson, at his chambers in Lincoln's Inn, and delivered to him his aforesaid will, bearing date the second of May, 1820, together with a paper writing being the testamentary paper or codicil now marked with the letter B.; and he then mentioned to his said solicitor, that he wished a new will to be prepared with such alterations to be made therein as were pointed out in the said paper writing marked B. And the said Julius Hutchinson, having read over the said paper of instructions, in the presence of the said deceased, and observing that several of the alterations therein suggested would not be requisite, as the events and circumstances to which

they referred were already provided for by his said will; he thereupon informed the said deceased that a codicil embracing the remainder of the wished for alterations would be sufficient. That the said Julius Hutchinson further observing, that by the said paper writing marked B., the bequest of the residuary estate as contained in the will was intended to be revoked, and not conceiving that complete instructions were contained in the said paper writing for disposing of the same anew;—he asked the said deceased in what manner he wished the undisposed of residue to go;—to which the said deceased replied, that “he meant it to go to his executors,” adding, that he supposed that would be the effect of the expressions used by him in the said paper of instructions: for that having bequeathed the residue to his executors, they would take the excess beyond what might be specifically bequeathed, or he the said deceased expressed himself in words to that or the like effect: but the said Julius Hutchinson did not commit the said deceased’s explanation, in that behalf, to writing.

Secondly, That the whole body, series, and contents of the said paper writing, or codicil, marked B., beginning and ending as is hereinbefore set forth, pleaded, and referred to in the next preceding article, were and are of the proper handwriting of the said John Forbes the deceased in this cause.

Thirdly, That the deceased at the time of his delivering the aforesaid paper of instructions marked B., to the said Julius Hutchinson, as before pleaded, was apparently in good health; and having treated the subject as a matter to be attended to at his, the said Julius Hutchinson’s, leisure, who had at that time occasion to go to the Continent upon particular business, the preparation of the said intended codicil was postponed by him as a business which might await his return; previously to which the said deceased died suddenly, as hereinafter pleaded. That at the time of the said deceased’s death, the said original will and paper of instructions remained in the custody of the said Julius Hutchinson, for the purpose of his preparing a codicil, agreeably to the directions therein set forth.

Fourthly, That the deceased, who was at the age of seventy-eight years or thereabouts, was taken suddenly ill at his house in Fitzroy Square aforesaid, between nine and ten o’clock in the evening of the 20th day of June now last past, and died before the following morning; and on or about the thirtieth day of the said month of June, a search being made amongst his papers, the aforesaid testamentary paper or codicil marked A., beginning thus, “London, March 1st, 1821:” ending thus, “To the widow of my late nephew Thomas Forbes, I leave five hundred pounds,” and subscribed by the said deceased on the three first pages thereof, was found in the left side of a writing table or desk in the dining room of the said deceased’s house in Fitzroy Square, at which he usually wrote, and in which he kept his cash book and papers of value. That James Mindenhall, the butler of the said deceased, was in the habit of frequently going into his master’s room to see whether he wanted any thing; and did on the forenoon of the day of the said deceased’s death, on entering the said dining room, observe the said deceased sitting at the aforesaid table or desk employed in writing, that he went near enough to the said deceased to see that he had before him a paper written almost all over, of the size of a sheet of foolscap paper:—and that it was folded in the manner such paper usually is when

written upon book-ways;—and the said deceased on being so interrupted, did in the presence of the said James Mindenhall fold up the said paper, and put it into the left side of the said table or desk. And the party proponent doth allege and propound, that when the said desk was searched as aforesaid, after the said deceased's death, there was not any paper found therein which answered the description of that upon which the said James Mindenhall so saw the said deceased engaged in writing, except the aforesaid paper writing now marked A., pleaded and propounded in this cause, as a codicil to the will of the said deceased.

Fifthly, That the body, series, and contents of the paper writing marked A. was in the handwriting of the deceased.

The following are copies of the testamentary papers propounded in this allegation.

A.

London, March 1st, 1821..

In the case of my inability to make a regular codicil to my will made and published on the second day of May, 1820, I desire the following to be taken as a codicil to, and as a further part of my said will.

I revoke that part of my will, wherein I bequeath in the ninth page thereof the residue of my personal estate to and among my grand nieces that may be living at the time of my death, and in lieu thereof, I will and bequeath to my grand nieces the sums that may fall into the residue on the death of such of my nieces as may die or depart this life without issue them surviving, to be paid to and divided among such of my grand nieces as may be in life at the death of every such niece respectively.

I desire my executors to give up to my tenants in Aberdeenshire the full half year's rent they may have to pay at the first term of Martinmas or Whitsunday, after my decease.

As the ship Bombay is now on the last of her chartered voyages, my object in retaining an interest in her no longer exists, except in the event of her being chartered again on reasonable terms by the Company, in which case I should be willing to make some sacrifice to get John Shepherd a command.

In case of the death of my cousin, the Reverend Thomas Gordon, and of my cousin the Reverend Robert Shepherd of Daviot, before me, I desire that the sum left to each of them by my will, may be divided equally among and between the widow and daughters of each.

I am the sole trustee to the marriage articles of Daniel Ross of Calcutta, with his late wife Elizabeth Forbes, its amount is 838*l.* 10*s.* 1*d.* in the consols, standing in the names of John Forbes, Charles and Michie Forbes, the husband has the interest during his life, and on his death it is to be divided among a large family.

I bequeath to my executors in trust five thousand pounds to be by them applied as donations to five of the hospitals supported by voluntary contributions, situate at or near the most public entrances into London, that admit of casualties at all hours of the day or night. I leave two thousand pounds to my executors in trust, for the purpose

of building a bridge over the river Don, in Strathden, the situation to be chosen by them.

I bequeath the following legacies:—To Joseph Cotton, Esquire, of the Trinity House, three thousand pounds; Major Daniel Mitchell, one thousand pounds; Mrs. Dorothea Morley, two thousand pounds; Miss Harriet Morley, one thousand pounds; Miss Caroline S. Patrick, one thousand pounds; to Lady Grant, the widow of the last Sir Archibald Grant, of Monymusk, I leave one thousand pounds; and to her five daughters, I bequeath to each of them five hundred pounds; to each of the three daughters of the late Mrs. Grant of Drununnor, I bequeath five hundred pounds. To my remaining cotemporaries, John Forbes the comptroller-general, Gordon Forbes, and James Forbes of Seaton, I beg their acceptance of one hundred guineas for a ring each. To my old India friends, Edward Ravenscroft, Edward Russell Howe, James Smith, Thomas Wilkinson, William Page, John Morris, David Inglis, George Simson, Generals La Macquarrie and Benjamin Gordon, Alexander Gray, Paul Shewcroft, and Robert Henshaw, I request that each of them will accept of one hundred guineas as a mark of my regard. To my friend Alexander Tulloh, I leave one hundred guineas as a token of regard.

I leave my coachman and butler two hundred pounds each, over and above what they will be entitled to by my will.

I recommend Alexander Gray to be retained at a salary, to assist my executors in winding up my estate.

To William E. Montgomerie, son of my former commander Alexander Montgomerie, Esq., of Annech Lodge, I bequeath five thousand pounds, for the esteem I bore his father, and the obligations I have been under to him.

I desire my executors to pay in five hundred pounds to the Middlesex hospital, as a donation from me.

To the widow of my late nephew(a) Thomas Forbes, I leave five hundred pounds.

B.

Personal Estate.

[2d Page, bottom line.]

Omit altogether the exception of the ship Bombay which is repeated again in the page following.

[3d Page.]

Omit altogether the occupation of the house at Bellabeg by my niece Christian Stuart (since deceased) and place the provision for her daughter and son in its proper place.

[4th Page.]

Eleven lines in this page as marked thus "to be omitted as unnecessary, as the individuals referred to in it are all of age.

[8th Page.]

It being evident that three of the four nieces there alluded to are past the age of childbirth; it is my meaning that at their death, the principal sum from which they derive the annual income should be divided among the numbers of my great nieces that may be then alive, in place of making them my residuary legatees.

(a) This script was written on four sides of writing paper: the three first were signed by the deceased, the last was unsigned and not written to the end.

[9th Page.]

Two years wages to the servants that may be living with me at the time of my death in place of one; and a legacy of two hundred pound to my coachman, and the same to my butler, in addition thereto.

[Residue.]

The residue of my estate I bequeath to my executors in trust to make good and answer such legacies and remembrances to friends as I may nominate by a codicil to this my will when I can more particularly ascertain its amount, as at present it is liable to considerable diminution.

Lushington and ——— against the admission of this allegation.

Swabey and *Phillimore* in support of it.

JUDGMENT.

SIR JOHN NICHOLL.

The only question before the Court at present is, whether this allegation propounds such facts as will entitle it to be sent to proof.

In deciding upon the admissibility of an allegation, it is the duty of the Court to govern itself by established principle; if the facts pleaded are such as would not entitle the paper to probate, then an end ought to be put to the cause: if on the other hand it sets forth such circumstances as if proved might by possibility establish it, the Court, especially in a case like this where expense is no object, would not prevent the parties from bringing all the circumstances to its view.

John Forbes executed a will on the 2d of May, 1820; the validity of that will is not in contest; when it was made, he enquired of his solicitor, Mr. Hutchinson, whether any particular form of words would be requisite for the purpose of bequeathing legacies to relatives or friends, and was answered in the negative, as far as regarded absolute pecuniary bequests; and he then expressed his intention, to make himself at a future time a codicil containing bequests of that description;—the will itself also expressly reserves the power of giving legacies by a subsequent codicil. Upon this statement in the first article, it appears that it was still the intention of the testator to dispose of further legacies, and to do this by a subsequent codicil.

It is further pleaded, that on the 21st of June, 1821, he gave his solicitor paper B. for the purpose of making an entire new will. The solicitor told him that a codicil would be sufficient; and observing that the bequest of the residue was intended to be revoked, he asked him in what manner he wished it to go; to which the deceased replied, “to his executors,” adding, “that he supposed that would be the effect of the expressions used by him in the instructions:” but Mr. Hutchinson did not commit the deceased’s explanation to writing. These instructions therefore in paper B. did not answer the intentions of the deceased. The third article states, that the deceased at the time was apparently in good health, and treated it as a subject to be proceeded on at Mr. Hutchinson’s leisure, and left paper B. with him to prepare a codicil from; finding it not necessary to make a new will, and not thinking it matter that pressed, nothing was finally settled. I do not see how, under this statement, paper B. can be regarded but as a paper which did not answer its purpose:—if so it will be impossible that B. can be pronounced for. My present impression therefore is, that B. cannot form any part of the probate. It may have another effect, it may serve

as a proof of A.:—indeed in argument it has been contended that it has such an effect:—while on the other hand it has been contended to be a proof of the abandonment of that paper. It does not appear when B. was written,—it is confirmatory of A. in one respect, for it revokes the disposition of the residue in the will. It has been said, that it does not carry the intentions of the deceased into effect;—certainly it does not, but at least it does so far as it deprives his great nieces of the residue, which was his object;—and that residue being undisposed of would go to the next of kin, whom the law particularly favours. At the same time if this is not done according to the rules and principles of the Court, the mere object of arriving a little nearer to the intention would not induce me to admit it.

It has been argued that B. is an abandonment of A.: I have already stated my impression, that they were not intended to clash with each other;—there is no inconsistency in his adhering to A., after his conversation with his solicitor respecting B. His intention then was, not to have a new will, but to have his alterations in the form of a codicil. I cannot consider B. as evidence of his departure from A.; if it were otherwise however in this important case, I should allow all the allegation to go to proof.

The question therefore is, whether A. under the circumstances pleaded could receive probate.

Whether on the face of the paper it is finished or unfinished, perhaps it is not necessary to decide. Possibly I might think that it is in a state that would leave it open to evidence: but it is a different question whether connected with circumstances, particularly those which passed at the execution of this will, and referring to the will, and being all in his own hand-writing, and nothing at the conclusion to show that more was intended, and the deceased himself not considering it as a regular codicil, it might not be considered as a complete paper. But the case is not left to this consideration. The paper begins thus:—“*In case of my inability to make a regular codicil to my will, made and published on the 2d of May, 1820, I desire the following to be taken as a codicil to, and as a further part of my said will.*” It is said that this is provisional and conditional: but the Court has in many instances decided, that it means no more than “till I make a regular will, so long I adhere to this paper.” At bottom of the first, second, and third pages he signs his name;—he had not quite arrived at the bottom of the fourth page: it seems as if the paper was written at different times, from the different colour of the ink. The coachman and butler have legacies given them; and it is said that a similar notice being taken of them in B., shows an abandonment of A.;—to me it seems exactly the reverse; finding B. would not do, he afterwards adds to the other codicil;—this it may be said is mere conjecture, but it is quite as good as the other conjecture.

Taking this paper under these circumstances, though not actually concluded, yet the signing at the bottom of several pages, goes pretty strongly to show that he had made up his mind as far as it went.—Not being arrived at the bottom, he still kept it open in order to add from time to time any legacies he might wish to give; this is the natural construction, and slight evidence would satisfy my mind on this head.

Now what is pleaded in the fourth article could leave no doubt, “that the deceased was taken suddenly ill between nine and ten o’clock of the evening of the 20th of June, and died before the next morning;

—that paper A. was found in the left side of his writing desk in the dining-room, at which he usually wrote, and in which he kept his cash book and papers of value:—That James Mindenhall the butler, going into his master's room to see if he wanted any thing, did on the forenoon of the day of the deceased's death, on entering the room, see the deceased sitting at the aforesaid desk, employed in writing;—that he went near enough to see that he had before him a paper written almost all over, of the size of a sheet of foolscap paper, and folded in the manner such paper usually is when it is written book-ways; and the deceased on being interrupted, folded up the paper and put it into the left side of the desk; and that when the desk was searched after his decease, there was not any paper found in it which answered the description of that on which the butler saw the deceased writing, except the paper marked A." This description, as far as it goes, identifies the paper. It has been said, that these circumstances will not be sufficient to identify the paper,—I cannot anticipate what the evidence will be, but I must assume these facts to be true for the purpose of this discussion; and if a witness, beyond all exception, states these circumstances in a credible manner, it will, I think, bring up the case to the highest demand of the requisites called for by this Court:—on the most strict interpretation of our rules, it would be entitled to probate.

Under all these circumstances, I shall allow the whole allegation to go to proof.

Six witnesses were examined in support of this allegation, viz.:—Julius Hutchinson, the Solicitor; Thomas Hodgson Holdsworth, his clerk; Thomas Wilkinson, John Forbes Mitchell, Alexander Gray and James Mindenhall the deceased's butler.

JUDGMENT.

Sir JOHN NICHOLL.

In this case I have no sort of doubt. Two papers are propounded as codicils to the will of John Forbes; and though the Court went a good deal into the question, when the admissibility of the allegation was discussed: yet in a case of property of this magnitude, and where minors are concerned, I shall examine the question in detail, and with some degree of minuteness.

The magnitude of the property does not vary the principles on which the question is to be decided. Cases of imperfect papers occur so frequently in these courts, and the principles on which they turn are so familiar to us, that it is almost unnecessary to state them: yet it may be a satisfaction to the parties, and it is useful for the public, that the Court should from time to time repeat and enforce those principles.

If a paper on the face of it is in legal construction imperfect and unfinished, evidence of intention is let in, and must be gone into; and it may be shown, either that the deceased abandoned the intention he once had of giving effect to the paper, or that he was in progress towards finishing it, and only prevented by the act of God from completing it. The presumption is against an imperfect paper, and the burthen of proof against the party setting it up;—but the degree of presumption varies according to the state of imperfection in which the paper presents itself. In some instances it is so completely a mere memorandum, that proof of intention cannot be made but by strong extrinsic circumstances;

in other cases it is so nearly perfect—it has on the face of it such strong indications of testamentary intention, that slight circumstances are sufficient to outweigh the presumption against it. It may happen in some instances, that it is a matter of legal doubt from the force of the instrument. A disposition of personal property in the hand-writing of the deceased, requires no formality to give it effect, if none is intended by the writer.

Paper A. professes to be a codicil to a regular will,—it is described as a codicil,—it is all in the handwriting of the deceased; at the bottom of three sides of the paper the deceased has signed his name; at the bottom of the fourth sheet, which is not finished, he has not signed his name.

On the face of the instrument the Court is of opinion, that in legal construction and rational interpretation, it is imperfect and unfinished;—and that evidence of intention must be gone into, either to show that he intended it to operate in its present form, or that he was prevented from finishing it by the act of God. The amount of the evidence required must depend, not on one circumstance or one witness, but upon all the circumstances taken together.

The deceased lived in Fitzroy Square,—he died suddenly at nearly seventy-eight years of age, left a fortune amounting to 350,000*l.*, which he had acquired as a merchant;—his relations entitled in distribution were, a sister and several nephews and nieces;—his extrinsic relations were great nephews and great nieces, and he had a number of friends. He made arrangements for the distribution of his real estates in Scotland in 1816:—In May, 1820, he executed a long and formal will, disposing of considerable property, and appointing his executors trustees for the residue, which he bequeathed to his great nieces, intending to give further legacies as appears by a reservation in the residuary clause itself; this intention however does not depend on the formal (*a*) reservation in the residuary clause: the deceased intimated his intention of making such a codicil to Mr. Hutchinson his Solicitor, on the day he executed his will.

This evidence lays a strong foundation of probability of intention, as to any codicil appearing in the handwriting of the deceased on his death. On the 30th of June, ten days after his death, his friends met at his house, and the clause in page nine of the will attracting their attention, and something also mentioned by James Mindenhall, the confidential servant of the deceased, induced them to search for a codicil:—they found it in a repository. But when had the deceased last a reference to this paper? incontestably within a few hours of his death; not only it was found uppermost in his desk, but it was lying on his banker's book, it must have been placed there after he had had recourse to his banker's book, in which he had that very morning entered the check he had given to Mr. Gray for 600*l.*—which check bears date the same day: so that on the very day of his death he had made this entry. Paper A. is loosely put upon it, so that it must have been in his hands when he used the book. There is no reason whatever to doubt the correctness of the facts.—In the afternoon of that day, the

(*a*) The reservation was thus expressed:—“And as to all the rest, residue, and remainder, of my personal estate and effects, whatsoever and wheresoever, not hereinbefore otherwise specifically bequeathed or disposed of, (except such part or parts thereof, as I shall or may give or dispose of by any codicil or codicils to this my will) give and bequeath the same,” &c.

deceased was better than he had been for some days: but about nine o'clock in the morning as he was coming out of the watercloset, he was suddenly struck with death, and expired within an hour.

Under these circumstances is there the least reason to presume, that there was an abandonment of this paper, and not a continuance of intention which was only prevented by the act of God?

Another paper marked B. is propounded, which was delivered to his solicitor on the 12th of June; it is argued that this shows an abandonment of A.; but the whole of B. is not of the character of the codicil the deceased proposed to make; B. was for the purpose of making alterations in the will itself, not to substitute any papers in the place of A. This is the necessary construction that must be put upon B.,—the will was to be re-drawn to contain these alterations. There could not be the least inconsistency in adhering to A. and to B. The deceased does not show the slightest departure from his intention: when he comes to his solicitor he finds it not necessary to have a new will, but that a codicil would leave him at full liberty. It is dated March, 1821. It begins with stating, “that in case of his inability to make a regular codicil to his will, (made and published on the 2d of May, 1820,) he desires the following to be taken as a codicil to, and as a further part of his said will.”

I cannot admit this to be a conditional codicil as pressed in argument.

The next clause relates to the residue;—it has been observed that this alteration was not communicated to his solicitor: but if the intention occurred, it is not improbable that he thought himself incompetent to such an alteration of his personal property; at the bottom of the first page he subscribes his name,—the same on the two next; he continues legacies on the fourth, but not quite to the bottom, and to that he does not sign his name.

What is the rational inference from this? that by signing at the bottom to the three first pages, he had so far made up his mind;—it is not a deliberate memorandum:—he means by signing it to give it a greater degree of authenticity. Secondly, In going on and not reaching the bottom of the fourth page, the inference arises, that the paper is still in progress; and when I understand that he has only given about 30,000*l.* out of 130,000*l.* to which the residue amounted, the probability is, that he was deliberating, not as to what he had written, but as to what further he should give; this is confirmed by the appearance of the instrument. If my eye does not deceive me, several legacies are written at different times; some are rather in a different character of handwriting from the preceding bequest; the last legacy of all seems written in a different character, and with a different pen and ink.

This being the appearance of the paper so conformable to the codicil he had declared his intention of making when he made his will, though not finally completed, it has every appearance of intention that he meant to complete it; and I will not say that sudden death alone, and its being found in his repository, would not have been sufficient to entitle it to probate. But there is much further evidence;—how is it found? it was his habit to write at a desk in the dining parlour, and his habit when interrupted to put papers at which he was writing into that desk; the evidence of Mr. Williams, of Mr. Gray, and Mr. Holdsworth, goes to show that on opening this desk this paper was found uppermost in it:—it is

found exactly in the situation which leads to the confirmation of the inference, he wished the will of 1820 to continue as his will subject to these considerations. Mr. Hutchinson's evidence is complete.

The evidence and this paper lead me to draw these conclusions.

First. That when he carried B. to his Solicitor to have a new will made from it, he had not the slightest intention of suspending A.

Secondly. That after his conversation with Mr. Hutchinson, he adopted the suggestion of a codicil only, on the principle that no new will was necessary to make the alterations he proposed.

Thirdly. That this evidence comes out stronger than I had expected from the allegation, to show that the directions given by the deceased were final; and the deceased having left his Solicitor with full instructions to prepare the instrument, I apprehend by every rule of this Court the instructions are valid,—remaining with the Solicitor it was owing to his act alone, that the formal codicil was not prepared before the intervention of death.

What may be the effect of this codicil this Court cannot enquire into,—it belongs to a Court of construction to do this. It is said the Court of construction cannot carry the intention of the deceased into execution; but there is no reason why if it should be so, in every other respect, the paper as far as it can be corroborated, shall not be carried into effect; the very clause in B. respecting the residue, is a strong corroboration of A.

Indeed with respect to A., I see no reason to doubt that he was employed on that paper on the day of his death, for there is no doubt of the identity of the paper. Whether he added to it or not on that day, there is no direct evidence:—but the fair result of all the evidence is, that he did. On Tuesday Mindenhall swears he saw him employed on this paper,—he saw him with the pen in his hand. It is fully proved to me, that on Wednesday he had this paper under his consideration: the circumstances all tend to the same conclusion. Forbes Mitchell strongly corroborates Mindenhall, and says, that when the paper was first discovered there was a degree of freshness in the writing and colour of the ink which has passed away. We very well know, that when ink is exposed to the air it becomes considerably blacker; his observation therefore, does not apply to the present state of the paper, though there is still some difference in the appearance of the last sentence.

The whole of the evidence establishes the fact, that the intention of the deceased went with this paper till his death:—that it was in progress;—and that the final completion of it was prevented by the intervention of death.

I have no doubt or difficulty in the case. The Court has been admonished of the necessity of adhering to its principles. No person can feel more strongly than I do the necessity of adhering to them: but to pronounce for these papers, will be no departure from the strictest principles which have at any time governed the Court. Whereas on the contrary, to reject these papers would be to violate the most established rules, and to defeat the intention of the testator. Indeed if I were to do so, I do not see how after this, any imperfect paper could be carried into effect.

JONES v. BEYTAGH and BEYTAGH.—p. 635.

Letters of administration which had been granted to the executor of a creditor, rescinded before they had passed the seal, at the suit of the executor of a residuary legatee.

HENRY CUNIFFE died in 1810 leaving a will, in which John Wedderburn, Dominick Beytagh, and Henry Concannon, were appointed executors; and Dominick Beytagh, and Henry Concannon, residuary legatees. These several persons all died without taking out any probate or administration.

On the 24th of May, 1815, letters of administration of the goods of Henry Cuniffe limited to substantiate proceedings in the Court of Chancery were granted to John Williams the nominee of Mary Jones, widow. In January, 1817, letters of administration with the will annexed, of the rest of the goods of Henry Cuniffe were granted to Mary Jones as a creditor of the deceased.

In January, 1821, Mary Jones died. On the 2d of April, 1821, a decree issued against James Beytagh and Edward Beytagh, executors under the will of Dominick Beytagh, calling upon them to accept or refuse letters of the goods of Henry Cuniffe left unadministered by Mary Jones, or show cause why the same should not be granted to Frederick Jones, the son and executor of the said Mary Jones. This decree was served on the executors, James Beytagh and Edward Beytagh on the 10th of April, and returned into Court on the 9th of May. And on the 16th of May no appearance being given for the executors, letters of administration were decreed to Frederick Jones; when however they were taken to be sealed, a caveat was found to have been entered in the seal-book against them.

An appearance was now given for the executors of Dominick Beytagh, and the Court was called upon to rescind the letters of administration.

Jenner, for the executors.

By a misapprehension of the solicitor, directions were given to the proctor to enter a caveat instead of to oppose the grant of the letters of administration to Frederick Jones. This caveat was entered on the 9th of May, and the parties in Ireland had no knowledge of the proceedings till the letters of administration were granted. As they have not passed the seal, the Court cannot hesitate to rescind the decree. Letters of administration are the right of the representative of the residuary legatee;—practice has made this the law of the Court.

Swabey and *Phillimore* contra, for Mr. Frederick Jones.

The grant is discretionary with the Court. Our parties have been put to great expense and inconvenience, and the executors cannot be heard to aver the laches of their own agent as an excuse for having suffered the proceedings to go on so long unopposed.

The Court rescinded the decree, and granted the administration to the representative of the residuary legatee, on his paying the expenses incurred in taking out the decree.

GODDARD v. CRESSONIER otherwise GODDARD.—p. 637.

When a person entitled to an administration is resident abroad, the Court will expect due notice to be given to him before it grants administration to another party.

The mere service of the decree on the Royal Exchange will not be sufficient.

ARCHES COURT OF CANTERBURY.

LEE and PARKER v. CHALCRAFT.—p. 639.

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